

THE CONVEYANCER

AND

PROPERTY LAWYER

 VOL. 12, No. 2.

 DECEMBER, 1947

CONVEYANCER'S NOTEBOOK

Agricultural Land.—By an order the following sections of the Agriculture Act, 1947, are now in force, namely, sections 68–75, 76, 77, 82–94, 96, 97, 102–104, 109, 111 and part of section 110 (relating to appeals to enable the operative sections to function properly).

From the conveyancing point of view the most important of these provisions are to be found in sections 82–94, which deal with the general powers of acquisition and management vested in the Minister. Most of these provisions again require the Minister to take action if they are to be brought into effect. He has power to acquire land compulsorily (or to “hire” it for a period not exceeding thirty-five years) where he considers it unreasonable to expect adequate fixed equipment to be provided or maintained. This is one example of such powers, but one section calls for immediate attention by all conveyancers. The Minister’s consent is necessary under section 86 to any sale or lease for any extended period of any land which forms *part* of an agricultural unit. The point of this requisite is that splitting up the unit may produce less efficient farming and the Minister can only refuse his consent on this ground. The effect of failing to obtain consent is to render the land liable to be acquired compulsorily by the Minister at any time within three years of the disposition. The consequence of this section being in force is that on every purchase or substantial lease of agricultural land it will be necessary to add a requisition something in this form :—

Does the whole or any part of the land contracted to be sold form part only of an agricultural unit? If not, what evidence can the vendor produce that the land sold forms one or more complete agricultural units?

If the whole or part of the land contracted to be sold forms part only of an agricultural unit, evidence of the consent of the Minister of Agriculture to the sale must be produced.

In passing it may be observed that sections 68–75 which come into force deal with the constitution and powers of the bodies which are to be operative to enforce the Act and in particular the Agricultural Land Commission, the County Agricultural Executive Committees, and the

Agricultural Land Tribunals. In other words the machinery is being erected in order that the more general provisions may become effective when it has been run in.

Foreign Marriages.—Arising out of the difficulties connected with the marriage of British troops abroad the Foreign Marriages Act, 1892, has been amended by the Foreign Marriages Act, 1947. As might be expected this is a bit of legislation by reference and piecemeal, so that in any but a plain case reference must be made to this Act. Broadly speaking, section 22 of the 1892 Act has been extended to include members of the Navy, Army and Air Force in the place of the Army, and to include places outside the "British lines" provided that they are places where any part of the forces were "stationed". It only applies to "foreign territory", which excludes "any part of His Majesty's Dominions, any Protectorate or any other country under His Majesty's suzerainty in which His Majesty has jurisdiction". To this exception is made of any protectorate or place where His Majesty has suzerainty or any part of His Majesty's Dominions occupied by a foreign power, where by Order in Council it is declared that it is "foreign territory". The Act does not *normally* apply to Dominions' forces. There is power to dispense with any necessary consent to the marriage where a Secretary of State is satisfied that it cannot be obtained by reason of absence or inaccessibility or disability.

If a marriage solemnised before this Act would have been invalid it is rendered valid thereby, but if a second marriage was contracted prior to April 24, 1947, the first marriage will be deemed to be dissolved immediately before the second marriage.

Proceedings against the Crown.—This journal is not essentially concerned with litigious procedure, but we can hardly pass over in silence such an important measure as the Crown Proceedings Act, 1947. Fundamentally it is concerned with procedure, although in theory it alters the substantive law in enacting that His Majesty shall be liable in tort for the acts of his servants or agents, but this does not include a person "discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process": section 2 (5). This innocent-seeming exclusion may give rise to controversy. Does "responsibility of a judicial nature" include the functions of "quasi-judicial" tribunals, such as those set up under the Ministers of Town and Country Planning and of Agriculture? It is obviously undesirable for there to be any question of right of action where the ordinary Judges are concerned, or any one acting under their orders. But where matters of "policy" (which may include political expediency) enter in, and this must be the ground for such administrative tribunals, for we can think of no other, then this exclusion of liability becomes doubtful. It is true that the individual remains liable, even if the Crown is not, but the whole point of the Act is to remove such anomalies.

It is quite clear that the Crown is not liable unless there is a cause of action in tort against the servant or agent or his estate: section 2 (1); and any statute negating or limiting the amount due from a Government Department or officer of the Crown now protects the Crown equally: section 2 (4). Furthermore, there is an express saving for acts done under the prerogative or statutory powers: section 11. This last section is a little bewildering and may lead to unlooked-for complications in the interpretation of the Act. Presumably it applies particularly to such matters as requisition in time of war, because express reference is made to the defence of the realm and the maintenance of efficiency of the armed forces. But these acts are legal and, therefore, it is not clear why they should have been singled out for express saving clauses.

Speaking generally the Act does not alter the rule that statutes do not as such bind the Crown without mention, but express provision is made to include the law of indemnity and contribution, the Law Reform (Joint Tortfeasors) Act, 1935, the Law Reform (Contributory Negligence) Act, 1945, and the relevant provisions connected with patents, trade marks and copyright: sections 3 and 4.

There are also express provisions relating to postal packets and ships, docks, harbours and salvage claims and to liability arising where the person injured falls within the Royal Warrant for pensions for persons in the armed forces.

The procedure is dealt with in some detail, not relevant here, but it may be of interest to remark that jurisdiction is conferred upon county courts as well as the High Court.

Coal Mines and Conveyances.—A learned correspondent has raised the question of the most appropriate form of conveyance where there is or was a reservation of mines and minerals, pointing out that by the combined effect of the Coal Act, 1938, and the Coal (Nationalisation of Industries) Act, 1946, the old-fashioned form relating to mines of coal, etc., does not appear to be applicable. Fundamentally, this problem arises in three separate cases (though there may be permutations and combinations), namely, (a) where a conveyance is made reserving mines and minerals for the first time; (b) where all mines and minerals were reserved in an earlier conveyance; and (c) where coal mines only were reserved in a former conveyance. There is, of course, strictly the fourth and commonest case where no reservation exists or is intended to be made.

It is thought that the treatment of the last case offers the solution to case (a). It is not the practice to exclude from the conveyance coal and mines of coal. By statute the conveyance must have that effect and consequently it is not necessary, even where covenants for title as beneficial owner are included, to make any express exception of coal and mines of coal or even of the ancillary rights to work the coal which are conferred by the Act. Consequently the reservation of mines and minerals should take the usual form but should not, of course, refer to coal and mines of coal at all. The grantor cannot reserve or except rights which are already vested in some one else: he could

only make his conveyance subject to such rights, which should appear in the habendum and not in the parcels. The necessity for making the habendum of the grant subject to the rights to coal and mines of coal and ancillary rights seems to have fallen because, in fact, no private ownership of these rights is possible. The effect of the statutes is to take coal and mines of coal out of the realms of private conveyancing. This can, perhaps, be illustrated by comparison with another statutory exception. Under the Land Registration Act any transfer of registered land is subject to all overriding interests, whether or not entered on the register. It is not, therefore, the practice to mention overriding interests in the transfer (unless they are newly created or extinguished), because the transfer cannot affect them, and this also applies where mines and minerals are expressly excepted on the register. Here there is a difference from coal, because not all registered land is subject to the same or, indeed, any overriding interests, but with coal the exception is the same in all cases.

Where, however, reservation was made before the Acts the position is different in that the pending conveyance takes a special form, and it is the common practice of conveyancers not to interfere with parcels, etc., in earlier conveyances. We think that, perhaps, there is too much reluctance to do this and that thereby parcels become out of date and meaningless—but that is another story. If the prior reservation was of coal and mines of coal it would seem that the appropriate method of dealing with it is to omit from the conveyance all reference to the reservation. The reason for this is that the express reservation might not be the same as the statutory exception, and if this were the case and the conveyance contained covenants for title as beneficial owner there might be an implied representation that the rights of the National Coal Board did not *in fact* include some rights (excluded from the specific reservation) which were exercisable.

Assuming that it is right to exclude the express reservation of coal and mines of coal, it seems equally desirable not to mention coal and mines of coal in making a conveyance subject to an exception of all mines and minerals. It depends upon how this reservation was originally made. If the reservation was of all mines and minerals *simpliciter* then it should stand. If it was a reservation of coal and mines of coal and other mines and minerals, in our opinion the conveyance should be made subject to the reservation of all mines and minerals without referring to coal.

The vital problem is that the conveyance at all times should not purport to be restrictive of the actual rights of the National Coal Board. It seems to be quite unnecessary to ensure that their extent is actually specified.

Statutory Conveyances.—Another learned correspondent has raised a matter connected with our last paragraph. He raises the question of the effect of the assumed conveyance in connection with the Coal Industry Nationalisation Act and the regulations thereunder. Actually this question goes deeper than coal. This is only one aspect of the statutory conveyance which is becoming increasingly common. There are two peculiarities about these statutory conveyances. First,

they create rights without any document or other necessary method of ascertaining their existence. Secondly, the rights come into existence arbitrarily and it may be difficult to relate them to existing rules of law. A deed must be interpreted according to the known rules of law and equity: this does not necessarily apply to a statutory conveyance. For example, a right created by statute would be valid notwithstanding it might be void for perpetuity in a deed. This, of course, is familiar in connection with statutory powers. Another example is that of the statutory licence which binds not merely the present owner and occupiers of the land but any successors in title. This statutory licence has led to much confusion with easements, and a number of cases have shown the difficulty of deciding the principles on which damage flowing from user or interference with the licence should proceed. The problem of statutory conveyances will no doubt require repeated attention. We are publishing an "explanatory" article showing something of the extent of this problem.

Surname—change of name.—Another learned correspondent raises a very different question. A, the illegitimate child of B, has always been known by the surname of C, B's husband married shortly after A's birth. A is still under sixteen; *i.e.*, his mother is still technically liable for his maintenance. B wishes to avoid difficulties which arise from the child's name as appearing in the birth certificate being different from that habitually used by him, but there is no common form for change of name of an infant under sixteen where the parent's name is unchanged. In fact, the whole position really proceeds from a more fundamental difficulty. Notwithstanding the practice of registration of births of illegitimate children it has been laid down that though on baptism an illegitimate child can acquire a Christian name he is not entitled to any surname as such, neither of father nor mother: *R. v. Waters*, 1 Moore C. C. 457. The only surname of a bastard is that which he has acquired by reputation or subsequently himself designates. It is, of course, familiar learning that a surname can be changed without formality by any person (other than special restrictions applicable to aliens) and that the use of deed poll is useful only as evidence. In the particular case in point it would seem that the child really has its mother's surname after marriage by virtue of reputation and no question of change of name arises. Consequently it is a question of proving reputation. It is suggested that this is only possible in the circumstances by a statutory declaration of such reputation.

TOWN AND COUNTRY PLANNING ACT, 1947

(The following notes, issued by the Minister of Town and Country Planning, are reproduced for the information of subscribers.)

Notes for the guidance of buyers and sellers of land for development purposes in the period between the passing of the Act and the Appointed Day.

1. The Minister of Town and Country Planning has again issued a warning to buyers and sellers of land not to overlook the provisions of the Town and Country Planning Act, 1947, in drawing up the terms of their contracts and settling the prices to be paid. The two most important provisions of the Act in this connection are as follows :—

- (1) *First, a Development Charge may be payable in respect of any building or other development which is begun after the Appointed Day.* This is so even though a permission to develop may have been given by the local planning authority before the Appointed Day.

This Development Charge may be taken, broadly, to represent the difference between the value which the land would command if restricted to its existing use and the value of the land with the benefit of the planning permission to build on it or to change the use to a purpose different from the existing use.

The Appointed Day under the Act has not yet been fixed, but the aim is that it should be 1st April, 1948. A definite announcement will be made as soon as possible.

- (2) *Second, the owner of the land on the Appointed Day will be entitled to submit a claim for a payment out of the sum of £300,000,000 which the Act sets aside to meet claims for depreciation of land values.* The basis for distributing this £300,000,000 cannot be settled until some four years after the Appointed Day when all the claims have been received and examined and the necessary valuations made. When the Bill was first presented to Parliament, however, it was indicated that this sum was being made available to meet cases of hardship (a); and in considering hardship a distinction may very well be drawn between transactions which took place before the Bill was published, and those taking place after full public notice had been given of the terms of the Bill.

2. When the Act is in full operation, development values will have been taken out of private hands and transferred to the State. After the Appointed Day, therefore, a person selling land ought not to expect to receive (nor will a buyer, if he is wise, agree to pay) more than the “existing use value”—that is to say, the value the land would command in the market assuming planning permission would not be granted to build on the land or to use the land or the existing buildings for some new purpose. This is because the buyer, when he builds or starts his new use, will have to pay to the Central Land Board a Development Charge representing the development value. Clearly, he cannot be expected to pay the development value twice over; and, indeed, if after the Appointed Day, an owner holds out for an unreasonable price, the Act provides powers of compulsory purchase at existing use value.

(a) Explanatory Memorandum on the Town and Country Planning Bill (Cmd. 7006, para. 26).

3. In the period before the Appointed Day, the position is slightly more complicated. In the event of compulsory purchase of land by a Government Department or by a local or other public authority during that period, the Act limits the price payable to the owner to the existing use value as on 7th January, 1947, however ripe for development the land may be. Owners of land not already built upon, for example, are thus entitled to agricultural value only, even though the land may have a far higher value for development. But in respect of the development value the Act preserves the owner's right to claim against the £300,000,000 as if he were still the owner at the Appointed Day. In the case of private sales, however, the Act does not in terms control the sale price and buyers of land for development purposes must make their own arrangements with the vendor when settling the terms of the contract.

4. The following are the two main alternatives open to the parties :—

- (a) Agreement may be possible on the lines that the purchaser pays to the vendor only the existing use value of the land but covenants with the vendor to claim on the £300,000,000 and to pay to the vendor any payment received.

This produces substantially the same result as in the case of compulsory purchase. It leaves the vendor entitled to a payment out of the £300,000,000 as if he had not sold; it leaves the purchaser to pay the amount of the Development Charge when he comes to build.

- (b) Alternatively, the purchaser may be willing, despite the provisions of the Act, to pay to the vendor a price which includes development value.

A purchaser who agrees to this course should recognise that he will have to be prepared to pay, in addition, whatever Development Charge is in due course levied; and while he may eventually be entitled to a payment out of the £300,000,000 no indication can at present be given whether this will in fact be so, or how much any payment might be.

5. These two alternative courses represent the extremes. In between the two there is of course room for negotiation. For example, price adjustments can be made in the light of the terms of a particular contract; or a purchaser may agree to pay a price which includes the full development value on condition that the vendor indemnifies him against the Development Charge, or against any difference between that charge and the payment out of the £300,000,000; or a vendor may agree to sell at existing use value with provisions for adjustment if it turns out that the purchaser is able to develop before the Appointed Day so that he does not have to pay a Development Charge. These suggestions are by no means exhaustive, and are set out merely as a guide to vendors and purchasers and to their professional advisers. Other

arrangements will no doubt be devised to meet the requirements of a particular transaction.

6. It should also be remembered, in framing contracts, that the actual conveyance may be before or after the Appointed Day, and it may be desirable to include alternative provisions to meet either contingency. Where land is subject to a contract to sell at the Appointed Day, the claim on the £300,000,000 will normally be made by the vendor, but the Act enables the Treasury Scheme for distribution to include a provision requiring him to hold any sum which he receives in trust for the purchaser. It is not possible to say at the present stage what provisions will in fact be included in the scheme, but the provisions of any contract between the parties on this point would not be overridden. Parties would therefore be well advised to put the position in respect of the particular transaction beyond doubt by including express provisions in their contracts.

7. These notes have been drawn up with sales of a freehold interest primarily in mind. The general principles are equally applicable, however, to the granting of leases for development purposes, the framing of agreements for a lease, and other similar transactions. (In this connection, attention is drawn to section 58 (4) (b) of the Act, which enables the Treasury Scheme to make certain special provisions for dealing with interests and liabilities under a lease, as defined in section 119.)

The Ministry cannot undertake to advise in individual cases. Both sellers and buyers of land are advised to obtain professional advice before entering into commitments.

EDITORIAL NOTE

Owing to the peculiar character of the right to development value, which is a "personal right", it is not particularly easy to apply these principles to the existing position, since the right only strictly arises on the Appointed Day. We have provided some precedents in this number which, it is hoped, will deal sufficiently with the problem relating to freeholds.

The Water Abstraction Regulations, 1947 (S. R. & O., 1947 No. 2342, dated October 31, 1947).—Practitioners will be aware of section 6 of the Water Act, 1945, by which the Minister of Health is empowered to make regulations prescribing that records, etc., shall be kept by any class of persons "as to the quantity and quality of water abstracted by them", except in a case where the water is abstracted for domestic purposes only (see Vol. 10, p. 154). Regulations have now been made under this section (a), under which any person who abstracts water from "a well, borehole, adit or other underground work used for obtaining a supply of water", must keep certain prescribed records and render an annual return; the only persons exempt from these provisions are those abstracting for a domestic

(a) Water Abstraction Regulations, 1947 (S. R. & O., 1947, No. 2342), dated October 31, 1947.

purpose as above mentioned, and those abstracting from an underground work not capable of yielding 50,000 gallons of water a day (or, in seven named geographical counties (b), 20,000 gallons a day). The regulations also provide that the Minister may require any such person to cause an analysis of the water abstracted to be made (in a prescribed form), and to furnish a sample to the Minister. These obligations, including the analysis and provision of a sample, are imposed on the landowner or other person abstracting water at his own expense, although if "undue expense" would be incurred, the Minister *may* "direct that the requirement need not be complied with" (Water Act, 1945, s. 6 (1) (b)). In addition, he may have to tolerate the entry on his land of an officer of the Ministry of Health or of the Department of Scientific and Industrial Research to enforce the provisions of the Act and the regulations (see sections 6 (2) and 48 and Regulations, para. 6 (c)).

J. F. G.

Certificates under the Finance Act, 1947.—As the draftsman of the Forms of Certificate under the above Act appearing on p. 321 of the last issue, I have been asked to write a note on a point which has arisen in practice. The editor has received several letters from subscribers in regard to the Form of Certificate for insertion in leases at a premium.

John Molesworth & Sons, of Rochdale, write that if the certificate contains the words "other than rent" the stamping authorities will not accept it where the consideration exceeds £500 and does not exceed £1,500, and that they have had difficulties as a result of inserting a certificate containing the words "other than rent" in a lease where the consideration was £900 and the ground rent £3 7s. 6d.

Messrs. Forshaw, Richmond & Co., of Warrington, write that they have been engaged in correspondence with the Distributor of Stamps, Manchester, who has refused to stamp such leases when the above words were used, basing his refusal on the wording of section 54 (2) (a), which sets out the form of statement to be used in the instrument and subsection (5) of the same section, which provides that a reference to the amount or value of any consideration shall be construed as a reference to the amount or value of the consideration in money, stock or security other than rent. They further state that after a certain amount of indeterminate correspondence, they maintaining that no harm could be done by the insertion of the words in question, which were at most a repetition of words implied by statute, they were compelled to retire defeated from the conflict when the distributor politely but firmly informed them that if they did not accept his ruling, they could have the duty adjudicated. Owing to the delay in adjudication being so great in these days they were reluctantly compelled to have the clause deleted.

A further letter has since been received from Messrs. Hartley, Thomas and Wright, of Rochdale, stating that the Manchester Distributor of Stamps takes the view that the strict wording of

(b) Dorset, Gloucester, Hants, Lincoln, Norfolk, Suffolk and Wilts.

section 54 (3) (a) should be followed and the words "other than rent" deleted.

As the refusal to accept the form in the above cases appeared arbitrary and illogical, the general editor took up the matter with the Controller of Stamps and the following reply was received.

*Office of the Controller of Stamps,
Inland Revenue, Bush House,
South-West Wing, Strand, W.C.2.*

C. S. X. 1796/47.

*Certificates of Value in Leases
Finance Act, 1947, s. 54 (3), (5)*

Sir,—I am grateful for your letter of the 3rd instant. I regret to find that it is a fact that certificates pursuant to section 54 (3) (a) of the Finance Act, 1947, amplified by the words "other than rent" by reference to sub-section (3) of that section, have been rejected at some stamp offices. Instructions are being issued immediately to the effect that the amplified certificate must be accepted.

I am, Sir, your obedient servant,

F. S. TREDINNICK,
Controller of Stamps.

DONALD C. L. CREE, Esq.

It may therefore be taken to be established that the form will in future be accepted, and will enable the exemption from double duty on the premium to be claimed.

The objection raised by the Distributor of Stamps in Manchester appears to rest either on a failure to read the section as a whole, or a complete misapprehension as to its effect. There could be no objection to inserting words in the certificate which are in any case to be read into the statutory form by reason of the definition clause in sub-section (5) of section 54. This enacts that "in the last two foregoing sub-sections *any* reference to the amount or value of any consideration shall be construed . . . in relation to duty chargeable by virtue of the said heading 'Lease or Tack' as a reference to the amount or value of the consideration in money, stock or security other than rent". This must include the reference to the consideration in the form of certificate set out in sub-section (3), so that a certificate including these words is required. Further, if they are omitted in the certificate in the lease they will not be implied; the definition section relates to the Act, *not* to the lease. It would therefore be incorrect not to use them, as the resultant certificate would not accord with the statutory requirements.

The position under the present Act is in fact no different from that under section 15 of the Revenue Act, 1911, which was passed to remedy the omission of premiums or leases from the exemption from double duty in regard to conveyances where the consideration did not exceed £500, in the Finance (1909-10) Act, 1910. Section 15 of the Revenue Act, it is true, expressly required a certificate including the words "other than rent", but section 54 (3) of the Finance Act,

1947, read in conjunction with the definition sub-section in effect does the same.

The question could of course only have been raised in regard to cases where the consideration exceeds £500; where it does not exceed £500, section 15 of the Revenue Act, 1911, still applies. The footnote to the form in the *Conveyancer* perhaps does not make this quite clear.

This matter is of such importance that it has been considered worth while to deal with it at some length.

E. H. BODKIN.

MINISTERIAL DECISIONS AND NATURAL JUSTICE

Since the article on this subject was published in the July number (Vol. 11, p. 244), three further decisions of the Courts have made it clear that ministerial decisions, of the sort there referred to, are slightly but significantly harder to upset than appeared at that time.

First, *Franklin's Case* (the *Stevenage Case*) has been considered by the House of Lords ([1947] 2 All E. R. 289). Not only was the Court of Appeal's decision upheld, but the House went further in stating the law. The Minister in a case like that, where there is nothing resembling a *lis* between parties, is in no sense acting judicially or quasi-judicially; and it follows that questions of "bias" are irrelevant. The Minister's obligation is genuinely to consider the matters before him, which implies that his mind must not be so fore-closed one way or the other as to prevent him from "considering". This statement of the law represents an appreciable change from the "fair-minded" consideration and "perfectly open mind" demanded by the Court of Appeal.

Second, the *Phoenix Case* has been disapproved by the Court of Appeal in *Robinson v. Minister of Town and Country Planning*, [1947] 1 All E. R. 851, a case dealing with another part of the area dealt with in the Plymouth plan. That the *Phoenix* decision was wrong has already been suggested: see Vol. 11, p. 257; but the Court of Appeal disapproved it not merely on the narrow ground that it misinterpreted the words "laid out afresh and developed as a whole", but also on the broader and more important ground that the Court is not entitled to inquire into the sufficiency of the Minister's reasons for coming to his decision. Provided the Minister acts in good faith, no objective test of whether he is "satisfied" is possible. It is not entirely clear exactly where the line is to be drawn between *Robinson* and the case of *Roberts v. Hopwood*, [1925] A. C. 578: see Vol. 11, p. 257; it is, however, now clear that in cases involving ministerial discretions the Court can seldom be persuaded to intervene by arguments like those that succeeded in *Roberts v. Hopwood* and the *Phoenix Case*.

The third case—again in the Court of Appeal—is *Johnson v. Minister of Health*, [1947] 2 All E. R. 395. This was again an appeal by the Minister from a decision of Henn Collins, J.; it was a compulsory-purchase case in which the objector maintained (as

objectors have so often done before) that various letters on the Ministry's files ought to have been disclosed to him. It is noteworthy not so much for the decision itself, which follows *Offer*, *Miller* and *Price*, leaving *Errington* and the somewhat anomalous *Stafford* as still the only cases of this type in which the Minister has not succeeded. Its importance lies in the extreme clarity with which the Master of the Rolls analysed the position of a Minister who has to decide these disputes between local authorities and members of the public. He is not a Judge, and he is not really deciding a dispute between parties: for his primary obligation is to act as the public interest demands and not merely to consider which of two parties has the better case. To the extent that the public interest is involved he is necessarily acting administratively in giving his final decision, and it follows that the control to which he is subject is not that of the Courts but that of Parliament and the political system. The standards of "fairness" and "natural justice" by which the Courts measure the behaviour of those on whom judicial duties lie, are consequently quite irrelevant. It is only in so far as the Minister is deciding a "quasi-lis" between parties that judicial inquiry into his fairness is permissible at all. In particular the only documents he need disclose to the "quasi-parties", are those obtained by him for the purposes of the "quasi-lis".

This decision does not appear to make any change in the law as already formulated here (see Vol. 11, p. 259); but it does clarify it.

T. A. B. W.

STATUTORY CONVEYANCES

By J. F. GARNER, LL.M., Solicitor of the Supreme Court

In an article appearing in this journal in December, 1938 (*a*), the learned editors stated that the Coal Act, 1938, was a "statutory conveyance" of part of England—"which, it is believed, is itself a novelty". Novel as was the phenomenon in 1938, whereby the legal estate in land vested in a grantee solely by virtue of a statutory provision, at the present day, a bare nine years later, there are many examples of this consequence of nationalisation on the statute book. However, in spite of the Agriculture Act, 1947, the Town and Country Planning Act, 1947, and countless other restrictions on the user of land, from building by-laws to compulsory purchase designation orders (*b*), private individuals are still capable of holding estates and interests in land. In order, therefore, that practitioners may be able to advise their clients when such interests appear to have been expropriated by some statutory conveyance, and advisers of public authorities to deduce title to their clients' property acquired thereby, it is important to consider the exact significance of such conveyances.

It is here proposed to discuss some recent examples and to endeavour to anticipate the difficulties that may arise in practice. Naturally

(*a*) Vol. 3, at p. 190.

(*b*) *E.g.*, under the New Towns Act, 1946, s. 1.

each statute depends eventually for its effect on its own provisions, but a few general problems apply to all such statutes, and it is first proposed to deal therewith.

One of the most important clauses in any conveyance, from the point of view of precision and clarity in drafting, is the parcels. Unless it is clear beyond all possible doubt exactly what estate or interest in what property is being transferred, and whether or not such property is to include and or be subject to easements, restrictive covenants and other rights, the draftsman cannot be said to have fulfilled his duty to his client. And yet that care and precision so meticulously observed in the majority of private transactions, does not seem to have been observed in the drafting of most recent statutory conveyances.

Under the Law of Property Act, 1925, "conveyance" is defined so as to exclude a statute (unless the same creates a settlement (c)). Apart from the express words of the particular statute, many important sections of the 1925 Act therefore do not apply to a statute operating as a conveyance. Thus, section 60, providing for the abolition of technicalities in the law relating to words of limitation, is excluded. A statutory conveyance normally contains no express equivalent to a habendum, and it is accordingly not always clear what estate the grantee is to hold by virtue of the statute. The grantee will frequently be a corporation, and at common law (apart from the now obsolete case of a corporation aggregate of which all the members are dead in law (d)), a grant to a corporation aggregate passes the fee simple without words of limitation. If the grantee is a corporation sole, however, such as a Minister of the Crown (e), the grantee will take, in the absence of express provision to the contrary, only an estate for the duration of the term of office of the present holder thereof, with reversion in fee to the grantor; for at common law a fee simple cannot enure to the benefit of a corporation sole and its successors, unless the word "successors" is included in the limitation (f). Such may well be the result, for example, of the vesting of an interest in a voluntary hospital under the National Health Service Act, 1946, in the Minister of Health (even if such interest be the fee simple).

Of somewhat more practical importance is section 62 of the 1925 Act—the "general words" implied in the normal conveyance under seal (g). It would seem that a grantee under a statutory conveyance, again subject to the express provisions of the statute, is as regards rights covered by section 62 in exactly the same position as a purchaser of a mere equitable interest in the land. Such rights, privileges or easements as are legally appendant or appurtenant to the property will pass; ways of necessity and "quasi-easements" which were continuous, apparent and reasonably necessary to the enjoyment of the property transferred (h) would also pass, but the grantee would not

(c) Section 205 (1) (ii) and (viii).

(d) Challis, *Real Property*, 3rd ed., p. 225.

(e) See, e.g., Minister of Health Act, 1919, s. 7 (1), and Minister of Town and Country Planning Act, 1943, s. 5 (1); also Maitland's essay, "The Crown as Corporation", in 17 L. Q. R. 131.

(f) Challis, *op. cit.*

(g) *Borman v. Griffith*, [1930] 1 Ch. 493.

(h) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

be entitled to the less definite "advantages" which would pass under section 62.

Similarly, section 63 ("all the estate clause") will not apply to the normal statutory conveyance, but this is not of great consequence, as the statute itself normally provides that the interest of the grantor, whatever it may be, shall vest in the grantee. The law on implied covenants for title also has no application, for the grantee will only be able to claim that estate which has actually vested by virtue of the statute.

Further difficulties may arise if the land is registered under the Land Registration Act, 1925. Unless specific provision is made for the case of registered land (*i*), a statute cannot *per se* vest the legal estate in registered land in the grantee, for until the transferee's interest is registered, the grantor will be deemed to remain the proprietor of the registered estate (*k*). Presumably the Registrar will, in such a case, register the transferee as proprietor on receipt of an application referring to the particular statute, together with the land certificate of the relevant title (*l*).

Pending such registration, presumably the interest of the transferee under the statutory conveyance would be binding as if it were an overriding interest within the meaning of section 70 (1) of the Land Registration Act, 1925 (*m*), and any prospective purchaser would therefore be bound thereby, even if his vendor were unaware of the statutory conveyance, or that it affected the land. It is unfortunate that this point is not normally expressly provided for, but it could hardly be argued that the interests of the statutory grantees, just because they are not expressed to be overriding interests, would be void as against a purchaser unless they are noted on the register; by analogy to the reasoning in *Lewisham Corporation v. Maloney* (*n*), the Legislature obviously intended to confer "a right good as against all the world, and not liable to be voided by a failure to take a step—namely registration—not referred to" in the statute (*o*).

The most difficult problem in the average notional conveyance operating by virtue of a statute and without further assurance, is to ascertain exactly *what* passes thereunder. The phrase most frequently used in these statutes by way of "parcels", is "property, rights and liabilities" (*p*). "Property" is not normally defined in the particular Act, but as most of these statutes deal with local government, in such cases it seems logical to apply by analogy the definition of property contained in the Local Government Act, 1933, and to construe the other statutes individually. Section 305 of this Act states that, for

(i) As is done by s. 41 of the Coal Act, 1938, where it is provided that the provisions of the Act shall apply "as if the land were not registered land".

(k) Land Registration Act, 1925, s. 19 (1).

(l) Cf. *Oldham Corporation v. Bank of England*, [1904] 2 Ch. 716, where it was held that as Consols had vested in the transferee authority by virtue of a statutory transfer, such authority was to be entered in the books of the bank as the owner thereof, although certain procedural rules of the bank had not been complied with.

(m) It is expressly so provided in s. 41 of the Coal Act, 1938, but the writer is not aware of any statutory conveyance having a similar provision.

(n) [1947] 2 All E. R. 36.

(o) *Per Somervell, L.J.*, at p. 38, *ibid.*

(p) See, e.g., Education Act, 1944, s. 6 (3); Police Act, 1946, s. 1 (3) (b); Ministers of the Crown (Transfer of Functions) Act, 1946, s. 1 (3).

the purposes of the Act, "the expression 'property' includes all property, real and personal, and all estates, interests, easements and rights, whether equitable or legal, in, to and out of property, real and personal". Moreover, this explanation does not conflict with the narrower one contained in the Law of Property Act, 1925, s. 205 (1) (xx), *viz.*, "'property' includes anything in action, and any interest in real or personal property" (q). "Rights" and "liabilities" are not terms of conveyancing art, but although they are obviously intended to include personal obligations it seems that their exact meaning with regard to any particular parcel of land can only be assessed by reference to the nature of the estate held by the grantor prior to the statutory vesting.

The vesting section of the Act then frequently continues with the words "whether vested or contingent". Where the grantor is a natural person, the inclusion of these words is apposite, but when they are included in statutes of administrative nature, their purpose is by no means clear (r). Public authorities are but rarely entitled to interests in land in remainder, and it is submitted that these words are not intended to be understood in the strict conveyancing sense of *Fearne* or *Challis*. The words are not competent to pass a mere *spes successionis*, and they must, presumably, be read as referring to rights in personam.

In some instances the statute specifies which particular "property, rights and liabilities" of the grantor are to vest in the grantee. Thus, the Police Act, 1946 (s), provides for the vesting in the new police authorities of all property, etc., which was held by the grantee authorities "solely or mainly for police purposes". The property which would be transferred by virtue of an Order in Council (without further assurance) made under the Ministers of the Crown (Transfer of Functions) Act, 1946, is confined to that "held, enjoyed or incurred by any Minister of the Crown in connection with any functions transferred". The property of local authorities which is to vest in the new electricity boards under and by virtue of the Electricity Act, 1947, will only be "property held or used by the local authority wholly or mainly in their capacity as authorised electricity undertakings, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity" (t).

These provisions have in practice caused considerable difficulty. Thus, many boroughs who were police authorities before the Police Act, 1946, divested them of such powers, were in the habit of using large municipal buildings, partly for police purposes, and partly for other purposes, *e.g.*, as a town hall; such premises, being used "solely or mainly for police purposes", would vest in the new police authorities by virtue of the Act. Section 9 of the same Act provides that the transferor and transferee authority may agree as to the making of adjustments in relation to their respective property, rights

(q) But contrast the wider definition of "property" in the Bankruptcy Act, 1914, s. 167.

(r) See, *e.g.*, sections of the Education Act, 1944, and the Police Act, 1946, cited in note (p), *supra*.

(s) By virtue of this Act, most non-county boroughs lost their police powers to the administrative counties in which they are respectively situate.

(t) Electricity Act, 1947, s. 15 (1).

and liabilities, and also that in default of agreement, the question shall be referred to arbitration (section 9 (4)). It is also expressly stated that such arbitrator may provide in his award for the settlement of any question as to whether any adjustment ought to be made between the authorities, which might have been settled by agreement. The arbitrator is not, however, given any power to provide that a particular piece of property which under the statute is to vest in the transferee authority shall, for the sake of general convenience and subject to financial adjustment, remain the property of the transferor authority. To the conveyancer it seems, no doubt, desirable that an arbitrator should not be able to affect the title to property which has already vested under a statutory provision, but in practice this limitation on the powers of the arbitrator has at times caused injustice to the transferor authority. The transferor, being the smaller authority, will have a slighter bargaining power, and it may find itself bereft, without adequate compensation, of a useful building, previously used for many purposes.

Disputes of this type are avoided in the Fire Services Act, 1947, paragraph 8 (2) of the Fifth Schedule whereof provides that "where property is to be vested under the last foregoing sub-paragraph and it is agreed or determined as aforesaid that the property cannot conveniently be severed from other property, whether or not forming part of the same building, the other property shall also be vested in the fire authority, subject to such rights of the authority for the purposes of the said Act of 1938 [the "transferee authority"] to use the other property on such terms as may be agreed", and in each sub-paragraph there is provision for determination of any dispute by the Home Secretary in default of agreement.

Disputes over property of this nature between two or more Government Departments are hardly likely to come before the Courts, but under the Ministers of the Crown (Transfer of Functions) Act, 1946, it may not be easy to decide whether a particular building held by a Minister "in connection with" two or more functions (*u*), has been transferred by an Order made under the Act, relating to the transfer of one only of such functions.

Apart from questions of construction of the parcels, important questions may arise on the notional habendum in a statutory conveyance. In the habendum, it is normal in a conveyance under seal to state the restrictive covenants and other liabilities to which the estate of the transferee is to be subject. Presumably if the title is registered under the Land Registration Act, 1925, a statutory grantee will be bound by all overriding interests and interests noted in the charges register of the particular title; in the case of unregistered conveyancing, he will be bound by estates or interests not capable of being over-reached by a conveyance for valuable consideration, and by land charges (including local land charges) registered under the Land Charges Act, 1925. But what of equitable charges (not registered) of which the former owner had actual notice? On nationalisation (*e.g.*, coal, electricity undertakings, transport, etc.), compensation is paid, normally in the form of Government Stock, for the property

(*u*) This expression includes rights and duties: s. 8 (2).

divested, and presumably, therefore, the conveyance may be said to be for valuable consideration. In these statutes, however, the compensation is invariably paid by the Crown acting by the Treasury, a different body in law from the public corporations (National Coal Board, Electricity Boards, British Transport Commission, etc.), in whom the property is vested under the statute. Can it therefore be said that such grantee authorities are "purchasers" in the sense of the Land Charges Act, 1925? (a). The statute frequently provides that the property vested is to be subject to such "liabilities" and "obligations" (b) as were binding on the grantee; presumably these terms would include unregistered equities, but what of easements of necessity implied in the normal conveyance under seal in favour of the grantor? (c).

In the case of administrative statutes, where the conveyance takes effect by reason of the transfer of some governmental function or functions from one class of local or other public authority to another, the position is clearer, for the statute does not normally provide for the payment of any valuable consideration (d), and consequently the transferees cannot be said to be "purchasers", and must be deemed to take subject to all equities irrespective of the actual terms of the particular statute.

In addition to the above more general remarks, each statute in practice gives rise to its own problems of construction, and, with due respect to the learned parliamentary draftsmen, but few statutory conveyances can be found of which it may be said that the parcels have been defined beyond all possible doubt. Clarity of conveyancing language is, it seems, too much to expect of statutes drafted mainly from an administrative standpoint. It is now proposed to consider some of the more recent statutory conveyances and their individual problems.

(a) *Education Act, 1944.*

This statute (e), amended in some comparatively minor respects by the Education Act, 1946, revolutionised the educational system of the country. Educational functions are transferred from district councils (subject to the retention of powers by certain "excepted districts") to county councils, and provision is also made in the Act enabling voluntary schools to be closed altogether, or transferred to the local education authority. In the latter case, it seems that a formal conveyance is necessary for the transfer of the legal estate in the voluntary school property, and the case is therefore not strictly relevant to this article. Section 6 (3), however, provides a true example of a statutory conveyance. Thus sub-section provides that "all property which immediately before [1st April, 1945] was held

(a) "'Purchaser' means any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land": s. 20 (8).

(b) See, e.g., s. 14 (1) of the Electricity Act, 1947.

(c) As, for example, in *Corporation of London v. Riggs* (1880), 13 Ch. D. 798.

(d) A local authority is not normally compensated for the loss of a particular function or functions; but see the position under the Electricity Act, 1947, ss. 22-24.

(e) For a discussion of this Act from a conveyancing point of view, see article in this Journal, "Educational Property and the Education Act, 1944", Vol. 9 for September, 1944, at p. 32.

by the council of any county district solely or mainly for the purposes of any functions exercisable by them under the Education Acts, 1921 to 1939, and all rights and liabilities, whether vested or contingent, to which any such council were entitled or subject immediately before the said date by reason of the exercise of such functions shall save as may be otherwise directed by the Minister of Education . . . be transferred by virtue of this section to the local education authority". None of the terms used to limit the property which is to vest by virtue of this "conveyance" are defined in the Act, and the points made above would therefore apply.

(b) *Cable and Wireless Act, 1946.*

This Act provides for the transfer of personal property only, the subject-matter of the transfer being specifically and adequately described, as "all the shares of Cable and Wireless, Ltd., other than shares already held on behalf of the Treasury". This statutory transfer does not specifically name a transferee, but in the prevalent habit of administrative legislation of the present day, the transferees are to be nominated *by Order*, by the Treasury; the shares will then be transferred "by virtue of this section" to such persons "free of all trusts, liabilities and incumbrances", to be held on behalf of the Treasury (see section 1 (1)).

The old-fashioned property lawyer might argue, as was said in *Oldham Corporation v. Bank of England* (f), that "there is something in the nature of stock which really prevented it from being transferred without some instrument of transfer". In reply to this Vaughan Williams, L.J., said in that case, "It is equally true of every chose in action, that if there were not a transfer by Act of Parliament there might be a necessity for some deed or written transaction in order to accomplish the passing of the particular piece of property". But (the learned Lord Justice continued), Parliament had in fact so provided, and consequently the Bank of England were not entitled to call for any further assurance before registering the transferees under the statute as the holders of the stock in question. Presumably this reasoning would apply equally to the present statute, but in order that there may be no doubt, it has been provided in section 3 (2), that the Treasury's nominees shall be entitled "to be entered in the register of members in respect of the shares without the delivery to the company of any instrument of transfer". The business of the "operating company" (Cable and Wireless, Ltd.) will then be carried on by the Treasury nominees. Notwithstanding the provision that the nominees shall be "entitled to all the rights and advantages of members of the company" (section 3 (2)), any dividends they, as shareholders, may decide the company should pay, will be paid into the Exchequer (section 3 (5)).

(c) *Police Act, 1946.*

This statute, which is typical of administrative statutes having an ancillary conveyancing effect, has been considered above, and does not merit further treatment here.

(f) See note (l), *supra*.

(d) *Ministers of the Crown (Transfer of Functions) Act, 1946.*

This Act provides for the transfer to any Minister of the Crown, by Order in Council, of any "functions theretofore exercisable by another Minister of the Crown". The Act provides for the inclusion in any such Order of "such incidental, consequential and supplemental provisions as may be necessary or expedient", for the transfer of property held for the purposes of a function transferred by the Order. The construction of such Orders is not likely to cause much difficulty to the private practitioner, especially in view of the provisions of the Crown Proceedings Act, 1947, by which proceedings could be served on the Treasury Solicitor in any case of doubt (g).

(e) *National Health Service Act, 1946.*

This statute, when fully in operation (h), will cause the vesting of numerous properties throughout the country in the Minister of Health. Under section 6 (1) of the Act, "there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, . . . being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital". "Interest" is here presumably not intended to be restricted to the narrow sense of the Law of Property Act, 1925 (i), but should be understood to include estates. It is desirable also to refer to the definitions of the term "voluntary hospital" given in section 79 (1) of the Act:

"'hospital' means an institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid".

"'voluntary' means not carried on for profit and not provided by a local or public authority".

In most cases it will, of course, be clear that particular buildings are transferred by virtue of the Act, but the provisions are not free from difficulties of construction in some circumstances. Thus, would a hospital which habitually showed favourable financial balances be "voluntary" within the above definition? The division of premises used partly for hospital purposes and partly for other purposes may be avoided by regulations to be made by the Minister (k). Moreover, subject to the power of the hospital authorities to serve a counter-notice (within a stated time) to the opposite effect, the Minister may serve a notice to the effect that the hospital or "interest" will not be required, and in such case the vesting provision will no longer apply, the Minister's notice thereby operating as a reconveyance subject to

(g) Section 18.

(h) It is anticipated that the "appointed day" will be July 5, 1948.

(i) See, e.g., s. 1, where a clear distinction is drawn between estates and interests.

(k) Section 6 (5).

defeasance on the condition subsequent of the possible counter-notice (l).

The meaning of "premises", as used in the above section is not clear. The term is not defined in the Act, but presumably the definition of "premises" in the Public Health Act, 1936, may be applied by analogy. Section 343 of that Act provides that "'premises' includes messuages, buildings, lands, easements and hereditaments of any tenure", and under the Interpretation Act, 1889, s. 3, "'land' includes messuages, tenements and hereditaments, houses and buildings of any tenure". The term thus extended is clearly wide enough to include profits *à prendre* and other incorporeal hereditaments (m), but not "advantages" and similar rights passing under section 62 of the Law of Property Act, 1925.

The sub-section vesting hospitals managed by local authorities in the Minister does not cause the same difficulties of construction, as it is drawn in wider terms. Section 6 (2) provides that there "shall be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property (n) and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority". This section clearly divests the local authority of all its "hospital property", but the trustees of a "voluntary" hospital may not in all circumstances lose all their property. If a restricted construction be placed on the term "used for the purposes of a voluntary hospital" in section 6 (1) (o), it may well be that the trustees of a voluntary hospital will find themselves divested of their main property, but still having the responsibility of maintaining now comparatively useless ancillary property. It should be noted that the power given to the trustees enabling them to serve a notice requiring the Minister to take certain property (see above), only applies where property vested by virtue of the Act, and was subsequently divested under a notice served by the Minister.

(f) *Electricity Act, 1947.*

This statute, nationalising the electricity industry, provides (in section 14) that "all property, rights, liabilities and obligations [of certain named electricity undertakings], shall on the vesting date vest by virtue of this Act and without further assurance in such Electricity Board or Boards as may be specified . . .". In the case of the company undertakings, the substratum of their respective businesses will have disappeared, and presumably, subject to the distribution by way

(l) Do these provisions then create a settlement for the purposes of the Settled Land Act, 1925?

(m) "Whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal": Co. Lit. 6a.

(n) "Property" is also not defined in the Act, except that it is said to include rights (s. 79 (1)), but see above.

(o) It is submitted that, in accordance with the normal canons of statute law interpretation, all these "nationalising" statutes, being of a confiscatory nature, must be construed strictly in favour of the subject.

of compensation of "British Electricity Stock" (see section 20), the shareholders will be able to apply to the Court for the company to be wound up, on the grounds that its substratum or paramount purpose has disappeared (*p*). In deciding whether this has in fact occurred the Court will, of course, have recourse to the objects clause of the Memorandum of Association. On the other hand, enterprising companies may desire to continue in existence, with changed objects, and under section 76 of the Companies Act, 1947, it will be comparatively easy to alter the objects clause, merely by passing a special resolution, and no application to the Court will normally be necessary.

In the case of local authority undertakers, the vesting provisions apply only to "property held or used by the local authority wholly or mainly in their capacity as authorised undertakers, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity". The type of difficulty which arose under the Police Act, 1946, in the case of property used for more than one purpose, is in this case avoided by the provisions of section 15 (2), which permit of Ministerial regulations to be made providing for the exclusion of certain property, etc., from the vesting provisions, on agreed terms.

Section 19 of the Act provides a further interesting example of a statutory conveyance. By this section, it is provided (*inter alia*) that the Minister of Fuel and Power "may provide by order for the transfer to any Electricity Board of any property, rights, liabilities and obligations vested by virtue of this Act in another such Board". The head-note to the section reads "subsequent transfer of property from one Electricity Board to another", but it should be noted that the operation of the section is confined to property vested by virtue of the Act, and has therefore no application to after-acquired property; the section also does not exclude the possibility of an ordinary conveyance of land from one Board to another. An abstract of title of an Electricity Board (which is a body corporate having power to hold land without licence in mortmain (*q*)), might therefore consist of the Act of 1947, and a series of Ministerial orders under section 19.

(g) *Fire Services Act, 1947.*

This statute transfers the administration of the fire fighting services vested in county district councils under the Fire Brigades Act, 1938, prior to the formation of the National Fire Service, to county and county borough councils. Strictly speaking the Act itself does not operate as a conveyance of property to the new fire authorities, but paragraph 8 (1) of the Fifth Schedule provides that "regulations [to be made by the Home Secretary] may provide for the vesting in fire authorities of property vested on behalf of His Majesty for the purposes of the National Fire Service in a . . . fire authority for the purposes of the Fire Brigades Act, 1938". The exact effect of the conveyance cannot be known until such regulations have been made, but it seems that the effect of the Act is to vest all property now held

(p) See, e.g., *Re Baku Consolidated Oilfields, Ltd.*, [1941] 1 All E. R. 24.

(q) Section 3 (1).

by the N. F. S. in the new authorities, and as regards easements, etc., the transferees will presumably be in the same position as the N. F. S. immediately prior to the vesting regulations coming into operation.

(h) *Transport Act, 1947.*

This Act provides for the vesting of certain specified (*r*) railway and canal undertakings in the British Transport Commission set up under the Act (*s*). The vesting of the undertaking is to have the general effect that "all the property of the body immediately before the date of transfer shall vest in the Commission and, as from the date of transfer, the Commission shall, to the exclusion of the body, have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer" (*t*). "Property" is not defined in the Act, except that it is stated not to include a mere contractual right (*u*), but it is clear that the term is intended to be interpreted in a wide sense. Compensation for the statutory transfer is to be made, not to the companies themselves, but to their stockholders, by the issue of "British transport stock", and when such stock has been distributed the transport companies may be wound up compulsorily by the Board of Trade (section 24).

The Commission may also, under Part III of the Act, acquire certain undertakings carrying on the transport of goods by road. This is to be effected by the service by the Commission of a "notice of acquisition", specifying a "transfer date". The notice then operates, subject to disclaimer and any agreement to the contrary made between the Commission and the undertaking, to vest "all the relevant property on the date of transfer in the Commission free from any mortgage or other like incumbrance" (section 45 (2)). "Relevant" property in this provision relates to that which "immediately before the date of transfer was owned by the transferor and was held by him for the purposes of the undertaking", but it by no means clearly describes the property which is to vest by virtue of the notice of acquisition. For instance, would houses purchased by a private haulage company and let to its employees (many business concerns in these days of labour and housing shortage are adopting this means of retaining or securing staff) vest in the Commission by virtue of such a notice? Questions of this nature will be decided, not by the Courts, but by the Transport Arbitration Tribunal set up under section 105 of the Act (section 45 (6)). "Mortgage or other like incumbrance" is defined in the Act (section 125 (1)), as meaning "a mortgage, pledge or a charge or lien for securing money or money's worth", and it seems clear, therefore, that the provision could not be held to vest the property in the transferee Commission freed from restrictive covenants registered under the Land Charges Act, 1925, or the Land Registration Act, 1925, or from legal easements; unregistered equitable interests or "minor interests" would, however, presumably be overreached, for

(*r*) That is, all such undertakings in the country, with the exception of a few small and comparatively unimportant bodies.

(*s*) Section 1.

(*t*) Section 14.

(*u*) Section 125 (1); presumably a right *in rem* dependent on a contract *is* property within this section.

the notice of acquisition must be deemed to operate as a conveyance on sale, compensation being payable in respect thereof.

So far as passenger road transport is concerned, Part IV of the Act empowers the Commission to make "area road transport schemes", which may, subject to the approval of the Minister of Transport, provide (*inter alia*) for the transfer to any body "who are to provide passenger road transport services" under the scheme, "of the whole or any part of any undertaking, being an undertaking or part of an undertaking, the activities of which consist wholly or partly of operating passenger road transport services". A similar section (66 (3)) provides for the making of schemes dealing with certain harbours, under which harbour undertakings may be transferred to bodies specified in the scheme. Here we are faced with a fresh problem of construction; what is meant by the term undertaking? What interests in land of, say a Corporation Transport Department, will vest by virtue of an approved scheme? In the case of a local authority carrying on a harbour undertaking, which authority is also the highway authority, does a quay over which the public have rights to pass and repass as a highway, vest in the new harbour authority as part of the "undertaking", or does it remain the property of the authority *qua* highway authority? No doubt some of these and similar points will be provided for in the respective schemes when they are made, but the Act itself is silent on these points.

So far as harbour and other undertakings (except railway and canal undertakings covered by section 24, *supra*) whose functions and property have been transferred to the Commission or some other body under the Act, are concerned, the Act makes no express provision for their compulsory winding up. Their respective "paramount purposes" will, however, have disappeared, and shareholders will be able to apply to the Court for a winding-up order (cf. the position under the Electricity Act, 1947, *vide para. (f), supra*).

(i) *Coal.*

The Coal Act, 1938, is one of the most important statutory conveyances on the statute book, but its younger brother, the Coal Industry Nationalisation Act, 1946, bids fair to outshine it in importance. The 1938 Act operated as a conveyance of "all coal and mines of coal together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned and subject to the provisions of this Part of this Act with respect to the retention of interests arising under coal-mining leases and of certain other interests" (a).

The Act in effect vested in the Coal Commission all seams of coal in the country, but left the working thereof, the colliery undertakings themselves, and certain "retained interests" (such as the leasehold interests of persons actually working the coal), in private hands. The 1946 Act has now, however, taken the story of the nationalisation of

(a) For a more detailed discussion of this Act from a conveyancer's point of view, see article in this Journal above referred to, December, 1938, Vol. 3, at p. 190.

coal the next logical stage, and in itself provides another example of a statutory conveyance.

In the first place all interests in unworked coal, and in mines of coal, whether of colliery concerns or of the Coal Commission, including "retained interests" under the 1938 Act, vested in the National Coal Board "without further assurance" on the "primary vesting date", appointed by the Minister of Fuel and Power (b). As from the same date, again without further assurance, all other "interests" of the Coal Commission also vested in the Board (c).

In addition, most assets of colliery concerns were transferred to the Board, including (d) interests in "fixed and moveable property used for colliery activities" (e). By "fixed property" is meant "all buildings, works, fixtures, and fixed machinery and plant and the sites thereof" (f). Normally such a definition would seem to include the land itself "*usque ad coelum et inferos*", but "site" is defined to include, "in relation to any fixed property, in addition to the land on which it stands at ground level [this presumably means a stratum of earth to the depth of the foundations of the structure], so much of the subsoil and of the space above that land as the Board may reasonably require to use for the purpose of any of their functions". This would appear to leave strata of the upper air and of the infernal regions vested in the original owners of the land! Curtilages and development sites and colliery institutes, etc., are specifically stated also to vest in the Board.

Certain other assets of colliery concerns are to be transferred to the Board at their option, or at the option of the owners, either subject or not to arbitration in case of objection. These assets include interests of colliery concerns in farms and agricultural assets (First Schedule, para. 14), and in dwelling-houses or in other land for the purposes of providing housing accommodation for their staffs (*ibid.*, para. 13). The vesting took effect on the primary vesting date if the notice to exercise the option had been given before that date, or alternatively on the first day of the month next after that in which the notice is given (g). In the case of arbitration, those assets as are declared in the award to vest, will so vest "as if the original notice had been given on the date of the award".

It is expressly provided (section 5 (6)) that the vesting of any assets by virtue of the above provisions shall take effect "free from any charge or lien for securing money or money's worth to which they are subject"; presumably this would include registered charges. Local authorities in mining areas in particular should consider this provision in relation to such local land charges as final apportionments under the Private Street Works Act, 1892. "Easements and other restrictions, rights and liabilities subject to which, or free from which,

(b) January 1, 1947: Coal Industry Nationalisation (Primary Vesting Date) Order, 1946 (S. R. & O., 1946, No. 1986).

(c) See s. 38; the term "interest" is not defined for the purposes of this section.

(d) It should be noted that in this Act, throughout, it is "interests" which are stated to vest in the Board. This is, of course, academically sound, and it is unfortunate that other statutes have not adopted the same terminology.

(e) There is no definition of the expression "used for colliery activities".

(f) First Schedule, para. 25.

(g) Section 5 (2).

any of the said assets are to be vested in the Board", are provided for in regulations (*h*), made by the Minister of Fuel and Power under section 5 (7) of the Act. By these regulations, the vesting of an interest in "unworked coal, mines of coal, minerals, fixed property or other land", taking effect by virtue of the Act, is to operate as if a conveyance of the nature set out in the Schedule to the regulations had been executed, so far as the matters to which such vesting is to be subject are concerned, and also so as to vest in the Board such "easements and other servitudes (*i*), and all such other property and rights", as would have passed under such a conveyance. This notional conveyance is to be deemed to be to a purchaser for money or money's worth, with notice of all matters "whereof notice is material", and so that the provisions of section 62 (the general words) and section 63 ("all the estate" clause) of the Law of Property Act, 1925, apply thereto.

The "explanatory note" accompanying the regulations states that "the transfer is made subject to the restrictions and liabilities that would be imposed under a conveyance in common form". In the case of a severance of land it is customary for the grantor expressly to reserve to himself such rights of way, etc., as he may reasonably require for the enjoyment of the land retained; in the absence of such express mention easements of necessity only will be reserved by implication in his favour (*k*). It might be expected, therefore, that provision would have been made in the regulations for the notional conveyance to include such reservations, but the only relevant paragraph reads (*l*), "In a case in which any of the conveying parties has an interest in land other than the relevant scheduled property to which land a servitude that adversely affects the relevant scheduled property is annexed . . . the conveyance shall be deemed to reserve that servitude for the greatest interest for which it could have been reserved by that party . . .". A landowner cannot, however, enjoy a servitude over his own land, and it seems therefore that the words of the above paragraph are not competent to reserve easements of the type discussed to the grantor under the notional conveyance.

Property vesting by virtue of the Act and these regulations will vest in the Board "free from any equitable interest in or on or over the relevant scheduled property, or in or on or over the rents and profits thereof, which but for this provision would or might have been enforceable against the owner of the transferred interest, otherwise than in respect only of the benefit of:—

- (i) A servitude or restrictive covenant [whether registered or not; the Board is deemed to have actual notice thereof—*supra*].
- (ii) A rentcharge capable of subsisting at law [not arising under

(*h*) The Coal Industry Nationalisation (Vesting of Easements, etc.), Regulations, 1946 (S. R. & O., 1946, No. 1674).

(*i*) The word "servitude" refers strictly to a concept of the civil law, but is used in English law somewhat loosely to indicate rights to be exercised by a landowner accessorial to his ordinary rights or property over the property of a neighbour; the term, therefore, normally anticipates a dominant tenement, though this is probably not strictly necessary.

(*k*) "Where real property is severed by the grant of part of it there can be no implied reservation in favour of the property retained of an easement of convenience; but only of an easement of necessity": headnote to *Aldridge v. Wright* (1929), 98 L. J. K. B. 582; and see also *Corporation of London v. Riggs* (1880), 13 Ch. D. 798.

(*l*) Schedule, para. 2.

- a settlement within the meaning of the Settled Land Act, 1925].
- (iii) A contractual right having effect against the Board under section 7 of the Act [these are certain contractual obligations more particularly described in the Second Schedule to the Act].
 - (iv) If the transferred interest is itself an equitable interest, any equitable interest having priority over the transferred interest" (m).

Conclusion.

It is submitted that enough has been said to prove that practitioners should be on their guard in assessing the exact effect of the respective provisions of statutory conveyances. It is said in the preface to the 16th edition of Gibson's *Conveyancing* that in the past nine years, "the legislature has been too closely occupied with other matters to pay much attention to conveyancing". We would respectfully agree with this remark, but venture to wish that, while ignoring conveyancing the Legislature had not at the same time seen fit to enact many measures having a very considerable conveyancing effect. These statutes have been drafted, for the most part, primarily so as to effect administrative changes; their effect as conveyances is mainly consequential to the purpose of the respective Acts. The statutes considered in this article, and others shortly expected to come on the statute book (such as the measure nationalising the gas industry), will, however, cause the transfer to the State or public bodies of large areas, and it is essential that landowners and others affected should be fully acquainted of their respective legal rights and liabilities.

THE NATURE OF FRAUD ON A POWER IN THE CONTEMPLATION OF EQUITY

By BERTRAM B. BENAS, B.A., LL.B., of The Middle Temple,
Barrister-at-Law

When the wealth of English law in luminous terminology is borne in mind, the occasional endowment of some phrases which cannot be fairly brought within that category must be cheerfully accepted. For instance, we have the Trustee for the purposes of the Settled Land Act, 1925, who is in many ways distinguishable from the normal Trustee, the Trustee in Bankruptcy with parallel divergence from type, Legal Assets and Equitable Assets appearing with perplexing frequency in the older reports to the dismay of the novice in the law who has just begun to learn the differentiation between Law and Equity and the "fusion" of the Judicature Acts, Legal Fraud and Equitable Fraud, both, just as they stand, verbally an illustration of oxymoron, disturbing for the fair envisagement of the ethics of law, and Fraud on a Power,

(m) Paragraph 4 of the regulations.

perhaps the least comprehensively indicative of the real legal meaning of the term. Thus there are Trustees who are not quite what is normally understood by Trustees, Legal Assets might be Equitable Interests, while personal property appointed under a general power, legal in nature, would come under the group of Equitable Assets, and Fraud on a Power may well be devoid of any fraudulent content whatever. These observations have been prompted by the review of the authorities contained in the recent case of *Re Crawshay, Hore-Ruthven v. Public Trustee*, [1947] 1 All E. R. 643.

It so happens that in what is generally regarded as the leading case on the subject of Fraud on a Power, *Aleyn v. Belchier* (1 White and Tudor, *Leading Cases in Equity*), there appeared to be a fraudulent intent on the part of the donee of the power, who sought by exercising a power to charge with a jointure for his wife to create one for his own benefit. The exercise was vitiated by an agreement that the wife should only receive a part of the jointure by way of an annuity for herself, but that the remainder should be applied for the payment of the appointor's debts. It was held that such an agreement was a Fraud on a Power and the execution set aside save in so far as it related to the annuity to the wife.

In *Re Crawshay, supra*, Vaisey, J., observed: "As to the general principles which govern the question of fraudulent appointments, there are so many judicial pronouncements of high authority that it is difficult to make a choice, but I may refer to a short passage from the judgment of Lord Parker of Waddington in *Vatcher v. Paull*, [1915] A. C. 372, where he said at p. 378: 'The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the Common Law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose or intention beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and the appointee, whereby the appointor or some other person, not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid'". His Lordship proceeded to cite the following passage from *Portland v. Topham*, 11 H. L. C. 54, *per* Lord Westbury, L.C.: "the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall at the time of the exercise of the power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view of the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject, if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just and honest exercise of the power

committed to the appointor, and which he is to exercise as trustee". The learned Judge proceeded thus: "But I ought, having regard to these last words, to add the following observations from *Farwell on Powers* (3rd ed., p. 458): 'It will be observed that the essential notion is disposition beyond the scope of the power, not breach of trust by the donee, though it is not unusual to speak of the donee of a limited power as being in a fiduciary position. His position is referable to the terms, express and implied, of the instrument creating the power and the implied obligation not to appoint for an ulterior purpose, and is not in truth founded, like the position of a trustee, upon a state of conscience imputed to him by Courts of Equity. But there is a strong analogy between the obligation imposed on the donee by the terms of the instrument creating the power and that imposed upon a trustee by the terms of the instrument creating the trust'". If the analogy be extended, it would appear that the relationship between donor and donee of a power is on the quasi-contractual borderland of trust, the no-man's land between the territories of Common Law and Equity, not unlike some cases manifesting kinship with both agency and trust, although it must always be remembered that a power "once created does not necessarily involve the existence of any trusteeship or contractual relationship between the grantor and grantee, neither of which is inherent in a power as such" (*Farwell on Powers* (*supra*), p. 1, and see hereon *Lister v. Stubbs*, 45 Ch. D. 1; *De Bussche v. Alt*, 8 Ch. D. 286, and *Re Joicey*, [1915] 2 Ch. 115, at p. 118). Again, ordinary powers must be distinguished from fiduciary powers or powers coupled with a trust (Trust Powers). The distinctions sometimes can be exceedingly fine. The power on analysis may be found to impose upon the donee an obligation to exercise it. There may be a power to appoint among a class which creates no trust therefor. There may, however, be a power in favour of a class coupled with a trust to select from the class by the donee.

Such a power is in the nature of a trust. When such an intention is not carried out by the donee, the Court will carry into effect the purpose of the donor (see *Burrough v. Philcox*, 5 My. & Cr. 72). This is in contradistinction to a mere power, as in such a case the Court would not exercise it. On the other hand there can be a trust coupled with a power. The case of *Tempest v. Lord Camoys*, 21 Ch. D. 571, affords an illustration. If a testator makes a gift to "X" and "Y" to hold upon specified trusts with power of sale if they think fit, and "X" and some of the *cestuis que trust* desire a sale but "Y" exercising his discretion *bona fide* declines to sell, the Court will not enforce the power. However, it should be added if "Y" refuses to exercise any discretion at all, and declines capriciously to move on grounds wholly irrelevant, the Court will direct the exercise of the power (see *Klug v. Klug*, [1918] 2 Ch. 67, but see also *Re D'Epinoix's Settlement*, [1914] 1 Ch. 890). The distinction between *Burrough v. Philcox* (*supra*) and *Tempest v. Lord Camoys* (*supra*) reveals the difference between a power in the nature of a trust and a trust coupled with a power.

An appointment may be bad for the reason that the donee has appointed to appointees not objects of the power.

Where an appointment is partly to the objects of a power

and partly to others, the appointment to those who are objects of the power is good if severable from the bad appointment. "X" is donee of a power in favour of his children and appoints to a son and the son's wife and children without specifying the shares, with the consequence that the allocation to the son is undiscoverable. The appointment through being inseverable is accordingly bad (see *Alexander v. Alexander*, 2 Ves. Sen. 640, at pp. 644, 645, and *Whelan v. Palmer*, 39 Ch. D. 648, at p. 658). Put in general terms, although an appointment is made to the proper objects, yet the exercise may be a Fraud upon the Power when it has been induced by some bargain between the donee and appointee either to confer some benefit on the donee or some other person. As an instance *Arnold v. Hardwick*, 7 Sim. 343 may be cited where the appointee lent to the donee the fund appointed, although on good security. Again, the appointment may have been made with an improper motive, and is bad although the inducement is given by a stranger and the appointee is unaware of the real motive of the appointment (see *Re Wright*, [1920] 1 Ch. 108 at pp. 117, 118). A father appointed to an infant in ill-health who died shortly thereafter, the appointment having been superfluous, since the child on becoming *sui juris* or on marriage would have taken in default of appointment and in the interim had a right to maintenance out of the fund. The sole apparent reason for the appointment was that the donee of the power would as next-of-kin take on the death of the appointee. This illustrates the principle that apart from any bargain in that behalf where an appointment is made in the expectation that the donee of the power or a stranger would receive a benefit, such an appointment is a Fraud on the Power (see *Hinchinbroke v. Seymour*, 1 Bro. C. C. 395, and *Henty v. Wrey*, 21 Ch. D. 332, *passim* also *Wellesley v. Mornington*, 23 L. J. Ch. 49). However, the mere fact that the donee of the power may in the events which happen derive some benefit does not of itself involve Fraud on a Power (see *Beere v. Hoffmeister*, 23 B. 101, and *Henty v. Wrey*, *supra*). Furthermore, a donee of a power in favour of a class of which he is a member may appoint to himself (see *Taylor v. Allhusen*, [1905] 1 Ch. 529, and in respect of a jointure see *Saunders v. Shafto*, [1905] 1 Ch. 126). Likewise, if by agreement with the objects of the power a benefit is incidentally conferred upon non-objects, this is not necessarily a Fraud upon a Power, except if it is clear that no such appointment would have been made but for the agreement having that effect (see *Re Turner's Settled Estates*, 28 Ch. D. 205, at pp. 216, 217). If there be a fraudulent appointment by agreement between the donee of the power and the appointee, the bad element will vitiate the appointment *in toto* (see *Re Perkins*, [1893] 1 Ch. 283), but where the bad element is severable the appointment minus that element is good *pro tanto* (see *Re Oliphant*, 86 L. J. Ch. 452; *Re Cohen*, [1911] 1 Ch. 37; and *Re Holland*, [1914] 2 Ch. 595). As regards the position of purchasers for value in relation to Frauds upon Powers see L. P. A., 1925, s. 157, and the note thereon in Wolstenholme and Cherry, *Conveyancing Statutes*, 12th ed., pp. 512, 513. The release of a power by a donee, even if such donee derives some benefit thereby, does not become invalid (see *Re Radcliffe*, [1892] 1 Ch. 227, and *Re Somes*, [1896] 1 Ch. 250). But a donee of a special power cannot revoke

the appointment, where a power of revocation has been reserved, with a view to obtaining a benefit thereby and where a power is coupled with a duty it is incapable of release (see *Re Jones Settlement*, [1915] 1 Ch. 373, and *Chambers v. Smith*, 3 A. C. 795).

The raising of money by the release of the power and *pro tanto* the release of a prior life interest accelerating the reversion does not involve of necessity Fraud on a Power.

Such a transaction may be a necessity for a household, having regard to exigent circumstances, and although some benefit may accrue to the releasor incidentally, substantially the process has not been dictated by a fraudulent motive within the meaning of Fraud on a Power.

In *Re Crawshay, supra*, a testator settled a legacy on trust for his daughter "R" for life with remainder to her issue, but should no child of "R" attain twenty-one, then on trust for such issue of her brothers and sisters as she should by will appoint, and in default of appointment to be divided equally between all the children of her brothers and sisters as should be living at her death. By codicil the testator excluded the issue of "R" by "W" (whom she was about to marry) from taking any benefit under his will. The testator died in 1879, and "R" died in 1943, having been married once only, *i.e.* to "W" by whom she had two children who had attained twenty-one. At the time of "R's" death, four of her nephews and nieces were alive, one being "J. C.", a son of her brother "W. T. C." The latter died in 1918, giving by his will certain property to "J. C.", on condition that he assigned for the benefit of "R's" issue any interest to which he might become entitled in the settled legacy under the original testator's will or in exercise of the power of appointment. This direction was complied with by "J. C." and "R" by her will appointed the whole legacy to "J. C.", with the object of her own children deriving benefit. Vaisey, J., held that the nephews and nieces who survived "R" took vested interests in the settled legacy, and "R's" power to divest such interest by appointment was conferred on her by the testator in order that she might fiduciarily select one or more of them as recipients of her bounty to the exclusion or partial exclusion of the other or others on a due consideration of their merits and needs, and since "R" had exercised the power not for this purpose but to benefit her own children, the appointment in favour of "J. C.", failed, as being a Fraud on the Power. The general principle is admirably stated in H. A. Smith's *Principles of Equity*, 5th ed., p. 213, wherein it is observed that the appointor in exercising a limited power "must act with good faith and sincerity and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object, or require any benefit for himself, either directly or indirectly (citing *Duke of Portland v. Topham*, 11 H. L. 32, and *Re Cohen, supra*). And though the donee of a limited power may validly release it, he may not do so fraudulently any more than he can appoint fraudulently (citing *Cunynghame v. Thurlow*, 1 R. & M. 436n, and *Harrison v. Harrison*, 40 Ch. D. 418)." The principle applies to "cases in which there is not, as well as those in which there is an antecedent agreement with the appointee to effect purposes not within the scope of the power and as well to cases in which a benefit is sought

to be attained for third parties foreign to the power, as those in which the appointor seeks to benefit himself". It must be emphasised that fraudulent is a technical term in this behalf, and one must not assume that there is no Fraud on a Power because there is an absence of fraud within the meaning of ordinary parlance.

The principle in its ramifying application illustrates in abundance the fertile influence of Equity in the pursuit of absolute justice for the intentions of those who make dispositions, in fairness to those who make them and those in whose behalf they are made, and the long line of cases merit the closest scrutiny. The notes to *Aleyn v. Belchier*, *supra*, remain a valued source for exploration of the authorities and *Farwell on Powers*, 3rd ed., is the classic commentary, a distinction it shares with *Sugden on Powers*, the latter a repertory of continued service for the older cases. Useful collections of cases are to be found in *Kerr on Fraud and Mistake*, 6th ed., and in *Withers on Reversions*, 2nd ed., and in Brett's *Leading Cases in Modern Equity*. The forms relating to powers in the various sets of conveyancing precedents are helpful, illustrating the creation and exercise of valid powers in the light of the decided cases, and the precedents of releases should be surveyed in the same behalf. Summarising the position generally, a bad appointment may amount to actual fraud where the donee agrees with the appointee for the donee's own benefit or that of a stranger to the power, for a person having a special power must execute it *bona fide* for the end designed, otherwise it is corrupt and void and a deceit on the testator or settlor and a fraud on the remainder or other person entitled on default of proper appointment, to borrow the phrases relative thereto in *Aleyn v. Belchier*, *supra*.

A Fraud on a Power may have been perpetrated even if the appointee is ignorant of the intention of the donee at the date of the appointment and the agreement to follow such appointment made *ex post facto*. Similarly, even if the power is vested in the donor, and he agrees to appoint beyond the boundaries defined by him in the instrument creating the power, a Fraud on a Power is resultant. Again, the aim of the donee may be praiseworthy in itself but, so to speak, *ultra vires* the power, and the donee may have agreed to this course through ignorance or inadvertence in the nature of mistake. This is sometimes termed Constructive Fraud. However, where there is no agreement, "X" in the same instrument may appoint to "Y" who thereafter may settle the property or a portion of it on "Y's" husband and their children. An open agreement between donee and all potential appointees who are *sui juris* may be made by way of family arrangement, and if thereunder some benefit enures for the donee it is not *prima facie* bad, and may well be upheld as good (see *Agassiz v. Squire*, 18 Beav. 431; *Davis v. Uphill*, 1 Swanst. 129, distinguishing *Re Turner's Settled Estates*, *supra*). The burden of proof rests upon the party challenging the appointment, but a trustee of property, the subject of the questioned appointment, is justified in declining transfer to an appointee upon a *prima facie* suspicion based on general principles. The survey may be more hopefully concluded with some mention of valid appointments, which at first sight might seem open to question. Where an appointment is of a jointure in which the wife is solely interested, the appointment is justified and only any excess is bad (as where the

jointure is made to go beyond the wife to some other person) and *pro tanto* void (see *Aleyn v. Belchier*, *supra*). Again, where there is an appointment of a portion, if the Court can sever the bad part of the appointment from the good, the good *pro tanto* is valid, following the lines upon which excessive appointment is dealt. *Henty v. Wrey*, *supra*, a case full of apposite learning on the subject, is testimony (*inter alia*) to the view that the appointment to an infant is not necessarily a Fraud on a Power. The improper exercise of a power of sale by a mortgagee is in nature akin to a Fraud on a Power (see *Robertson v. Norris*, 1 Griff. 421, and *Warner v. Jacob*, 20 Ch. D. 220), and is only here mentioned to show another species of the genus which Equity has created and developed with great refinement to uphold the highest standard of propriety within the range of Equity's justiciable realm.

VARIATION OF MARRIAGE SETTLEMENTS AFTER DIVORCE OR NULLITY

By D. TOLSTOY, Barrister-at-Law

Marriage settlements on the familiar pattern are no longer the fashionable adjunct of marriages, fashionable or otherwise, as was the case a few decades back, but they are nevertheless encountered sufficiently often to make it necessary for every practitioner to be familiar with the circumstances in which they will be varied by the Court. Indeed, the fact that such commonplace transactions as separation agreements, life assurance policies and the purchase of a house may be marriage settlements accentuates this need. It is not here proposed to discuss in any great detail the principles on which and the extent to which marriage settlements are varied by the Court as this aspect will be found dealt with in all the standard text-books, but rather to examine some particular problems which are encountered when advising on questions of variation and deciding on the particular policy to be adopted.

The Court's power to vary marriage settlements is derived from section 192 of the Judicature Act, 1925. This section reads:—

“The Court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit, and the Court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage”.

This section, it will be observed, makes no attempt to define a marriage settlement and does not in fact use that expression, but speaks of “ante-nuptial or post-nuptial settlements”, leaving the Courts to define this expression. Hill, J., has twice ventured to do

so. *Prinsep v. Prinsep*, [1929] P. 225, at p. 232, contains the oft-quoted passage where Hill, J., said that a settlement was a post-nuptial settlement if it was

“upon the husband in the character of husband, or the wife in the character of wife, or upon both in the character of husband and wife. . . . The particular form of it does not matter. It may be a settlement in the strictest sense of the term; it may be a covenant by one spouse to pay to another, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state”.

In *Hargreaves v. Hargreaves*, [1926] P. 42, at p. 45, Hill, J., said :—

“This section is dealing with ante-nuptial and post-nuptial settlements and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of or because of marriage and with reference to the interests of the married people or their children”.

It is now proposed to examine three types of transactions which may be marriage settlements and, therefore, subject to variation after a decree of divorce or nullity.

LIFE ASSURANCE POLICY

A life policy on the life of one spouse, but which gives the other spouse a contingent or expectant interest in the sum assured is, if effected during the marriage, a post-nuptial settlement. A husband not infrequently assures his own life and, in order to save death duties by virtue of section 11 of the Married Women's Property Act, 1882, or for other reasons, the wife is expressed to be the beneficiary of the sum assured in the event of her surviving the husband; it is in a case such as this that the solicitor acting for the successful husband petitioner must not overlook the possibility of extinguishing the wife's interest under the policy. In *Stedall v. Stedall* (1902), 18 T. L. R. 254, and *Gulbenkian v. Gulbenkian*, [1927] P. 237, the husband had effected life policies on his own life with the sum assured payable on a given date “to the husband if alive, if not, to the wife if alive and, if not, to the husband's personal representatives”. The husband was the successful petitioner in each case, and in *Gulbenkian v. Gulbenkian* the Court extinguished the wife's interest under the policy, but in *Stedall v. Stedall* the petitioner preferred to ask the Court to order a settlement of the wife's interest under what is now section 191 (2) of the Judicature Act, 1925, and the Court directed the wife to settle her interest for the benefit of the husband and the children of the marriage.

SEPARATION AGREEMENT

Separation and maintenance agreements are not determinable by the wife's adultery (*Sweet v. Sweet*, [1895] 1 Q. B. 12), or by divorce (*May v. May*, [1929] 2 K. B. 386), or by nullity (*Fowke v. Fowke*, [1938] Ch. 774; *Adams v. Adams*, [1941] 1 K. B. 536), unless the particular agreement contains express words providing for its

determination on the happening of such events. Separation and maintenance agreements are, however, marriage settlements so that a successful husband petitioner, who would otherwise be forced to continue supporting the adulterous wife whom he has divorced, may obtain some relief by applying to the Court for a variation of the agreement. This is not a wholly satisfactory remedy from the husband's point of view since the Court will rarely extinguish the whole of the wife's interest under a separation agreement, but tends to leave her sufficient to live on reasonably according to her station in life (*Worsley v. Worsley* (1869), 1 P. & D. 648 : £200 per annum reduced by one-third; *Jump v. Jump* (1883), 8 P. D. 159 : 15s. per week reduced to 10s. per week; *Clifford v. Clifford* (1884), 9 P. D. 76 : £52 per annum reduced to £26 per annum; *Saunders v. Saunders* (1893), 69 L. T. 498 : £200 per annum reduced to £100 per annum; *Cooper v. Cooper*, [1932] P. 75 : 35s. per week reduced to 12s. 6d. per week).

"I think the principle is", said Jeune, P., in *Saunders v. Saunders*, *supra*, "where there has been an allowance under a previous deed, that such an allotment should be made as, having regard to the position of the parties, is such that the lady can live upon. I do not think it ought to be put higher than that". "We must not be understood to decide that in no case ought the whole [of the income of the guilty wife under the separation deed] to be applied for the benefit of the innocent party and the children", said Cotton, L.J., in *Clifford v. Clifford*, *supra*; and Fry, L.J., in the same case said : "I am far from saying that there may not be a case in which the Court would deprive the guilty wife of the whole income, but I think that we ought not to go to that length in the present case". Nevertheless, *Bullock v. Bullock* (1872), 2 P. & D. 389, is the only reported case in which the guilty wife's income was wholly extinguished as if "the respondent were dead and had died in the lifetime of the petitioner", but in that case the wife did not oppose the husband's application. But while preserving a part of the guilty wife's interest the Court will generally insert the *dum casta et sola* clause, so that a wife who is living in adultery or who intends to marry the co-respondent in fact loses all her interest under the agreement.

In the converse case of a wife who is in receipt of an allowance under a separation agreement expressed to be determinable on a divorce and who divorces her husband, it is open to the wife to apply for a variation of the agreement by deleting the clause which determines the agreement, the duration of the agreement being thus extended for the joint lives of the parties or otherwise. There is no reported case where the wife has made this attempt, but there is no reason in principle why such an application should not be successful. Maintenance which is, as it were, secured by this method has the obvious advantage over maintenance payable in the ordinary way under a Court order in that the amount of maintenance under the agreement remains static and cannot be reduced as and when the husband's income diminishes or if the wife remarries. It is true that the sums so payable cannot be increased if the wife's means diminish or the husband's means increase, but the wife's interests in this respect can be preserved by obtaining in addition to the variation of the agreement an order for maintenance, even if only for a nominal sum.

PURCHASE OF A HOUSE

It was generally assumed until the recent decision in *Smith v. Smith* (1945), 114 L. J. P. 30, that the acquisition of a house by the spouses, or one of them, would not *per se* create a marriage settlement. It was, of course, open for the parties to draw up a marriage settlement with a house or any other property as the subject-matter of the settlement, but attempts to read a marriage settlement into a mere transfer or acquisition of property unaccompanied by any deed of settlement had hitherto failed.

In *Chalmers v. Chalmers* (1892), 68 L. T. 28; 1 Rep. 504, the wife during marriage assigned to the husband property subject to mortgages, and on later divorcing him she claimed that this assignment constituted a post-nuptial settlement and asked for a reconveyance of the property. Sir Francis Jeune, P., held that the assignment was an out and out gift and not a marriage settlement, but while unable to order a reconveyance of the property, the Judge made an order under what is now section 191 of the Judicature Act, 1925, requiring the husband to secure to the wife as maintenance the value of the property subject to the mortgages. In *Hubbard v. Hubbard*, [1901] P. 157; 84 L. T. 441, the husband had assigned the lease of the matrimonial home to the wife and, upon the marriage being annulled, he sought a reconveyance of the house on the ground that his assignment of it to the wife constituted a marriage settlement. Sir Francis Jeune (as reported in 84 L. T. 441) came to the conclusion that though the assignment was in law an out and out gift there was nevertheless a settlement within the meaning of section 192 (2), because "it was intended to be a gift for the preservation of that property given in consequence of the matrimonial relations and because of those matrimonial relations and intended to preserve the property for the benefit of one of the parties to those relations". The Court of Appeal reversed this decision, on the ground that a gift could not be a settlement. It seems clear from Sir Francis Jeune's judgment—though he does not say so in terms—that his reason for holding that the assignment in *Chalmers v. Chalmers*, *supra*, did not, and that the assignment in *Hubbard v. Hubbard*, *supra*, did constitute a settlement was based on the fact that in the latter case the property assigned was in fact the matrimonial home, but this reasoning did not commend itself to the Court of Appeal.

It was in this state of the law that *Smith v. Smith* (1945), 114 L. J. P. 30 came to be decided by Denning, J. In this case the husband, while living with his wife, bought a freehold house which was conveyed to both "in fee simple as joint tenants upon trust to sell the same with power at discretion to postpone the sale" and to stand possessed "of the net proceeds of sale and of the net rents and profits until sale in trust for the husband and wife as joint tenants beneficially". The parties afterwards lived in this house as their home and the wife was in fact still living there when the husband divorced her on the ground of her desertion. Denning, J., held that *Hubbard v. Hubbard*, *supra*, was not directly in point and that there was here a post-nuptial settlement which could be varied by extinguishing the wife's interest under the trust for sale. It is interesting to examine

the reasoning which prompted Denning, J., to find as he did: "[The husband's] counsel submitted that the provision of the house was for the future benefit of both the spouses and was a 'settlement'". He relied on *Bosworthick v. Bosworthick*, [1927] P. 64, and *Prinsep v. Prinsep*, [1929] P. 225. [The wife's] counsel submitted that it was a gift to the wife of a half-share in the house and was not a 'settlement'. He relied on *Hubbard v. Hubbard*, [1901] P. 157, and *Brown v. Brown*, [1937] P. 7. I find it difficult to reconcile the decisions in *Hubbard v. Hubbard*, *supra*, and *Brown v. Brown*, *supra* [where the purchase of an annuity by one spouse for the other was held to be a gift and not a settlement] with the principle that runs through the rest of the cases on this subject. That principle, as I understand it, is that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the Court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement; or without them as in a separation deed or bond; but it may take other forms. The transfer of an investment into a wife's name, whether it be a house, or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment".

So far Denning, J., adopts the reasoning of Sir Francis Jeune in *Hubbard v. Hubbard*, *supra*, in thinking that a gift is a "settlement" within the meaning of section 192 if it "makes a continuing provision for the future needs of the wife in her character as a wife". But this was precisely the reasoning which was rejected by the Court of Appeal, which reversed Sir Francis Jeune's judgment, stating emphatically that his decision could not be supported "for the plain reason that the deed is not a settlement at all. . . . This deed is not a 'settlement' in any sense and cannot therefore be a settlement within [section 192]."

The out and out purchase from an insurance company of an annuity by one spouse for the other would be a "marriage settlement" if Sir Francis Jeune's, and Denning, J.'s test were applied, but in *Brown v. Brown*, *supra*, Langton, J., was constrained to hold on the authority of *Hubbard v. Hubbard*, *supra*, that such a purchase was not a "settlement". "It appears to me", said Langton, J., "that the payment of a sum of money to an insurance company to purchase an annuity for the respondent comes closer to an analogy of an assignment of property or goods than to any parallel that can be drawn from a bond. . . . I cannot distinguish this annuity from a gift . . . this annuity is not a settlement because it is a gift".

It is respectfully submitted that the passage from Denning, J.'s judgment quoted above is in conflict with earlier authorities, including that of the Court of Appeal in *Hubbard v. Hubbard*, *supra*, and cannot stand. But then Denning, J., gave a second reason for his finding that the purchase of the house in the joint names of the two spouses is a settlement. He said: "The result was that the husband

and wife held a joint tenancy of the legal estate in the land (which could not be severed) and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking appropriate steps). . . . So long as husband and wife were living together in the house they of course shared the occupation and acquiesced in the postponement of sale, and if they had continued in that way till one died the survivor would take the whole legal and beneficial interest in it. If they together let or sold the house, either of them could sever the equitable joint tenancy in the income or proceeds, whereupon each would be entitled to one-half. No letting or sale could, however, be effected by one without the consent of the other, except by order of the Court of Chancery, which would consider whether in the particular circumstances it was right and proper that such an order should be made. . . . Neither *Hubbard v. Hubbard, supra*, nor *Brown v. Brown, supra*, directly covers this case. This freehold home was a continuing provision for the future needs of both husband and wife in their character as such. Neither could dispose of it without the consent of the other except by taking proceedings in Chancery”.

It is submitted that it is in this latter passage that is to be found the *ratio decidendi* distinguishing the transactions in *Smith v. Smith, supra*, from those in *Chalmers v. Chalmers, supra*, and *Hubbard v. Hubbard, supra*. It is the fact that the wife only had a limited interest in her share of the house and had not the power to dispense of it without the concurrence of the Court or of the husband, which caused the conveyance giving her joint ownership of the house to constitute a post-nuptial settlement.

WHAT IS A MARRIAGE SETTLEMENT ?

What, then, is a marriage settlement? Though the word “settlement” must be given a liberal meaning and “embraces a large number of settlements which might not appear to be settlements in the strict sense of a conveyancer” (*Melville v. Melville*, [1930] P. 159, 172), the word is not an all-embracing term and there are certainly transactions which are not settlements at all and, therefore, not marriage settlements. In the passages from *Hargreaves v. Hargreaves, supra*, and *Prinsep v. Prinsep, supra*, quoted above, Hill, J., does not attempt to define the transactions which constitute settlements but only to define settlements which constitute marriage settlements. The particular transactions which Hill, J., was considering were clearly settlements and all he had to decide was whether or not they were marriage settlements.

Some progress towards a definition of a marriage settlement, even if it be only in the negative sense, can be made by eliminating the transactions which are not settlements at all. First, as has already been seen, an out and out gift or assignment, so that *dominium* passes from the donor to the donee, is not a settlement at all and, therefore, not a marriage settlement: *Hubbard v. Hubbard, supra*; *Brown v. Brown, supra*. Secondly, a will is not a settlement, so that an interest devolving on either spouse by will cannot be varied as a marriage settlement: *Lorraine v. Lorraine*, [1912] P. 222; *Garratt v. Garratt*, [1922] P. 230. These are the two negative tests. Whether all other

transactions whereby property devolves "upon the husband in the character of husband, or the wife in the character of wife, or upon both in the character of husband and wife" are marriage settlements remains to be decided, but it may be that the definition of a marriage settlement must at present be accepted as a negative one, defining what is not and not what is a marriage settlement. A variety of transactions, from a simple covenant to pay an annuity to a strict settlement, have been held to be marriage settlements, but the Courts have steadfastly declined to give any general definition, though Hill, J., twice made a bold attempt to do so. Subject to the two negative tests, Hill, J.'s well-known pronouncement in *Prinsep v. Prinsep*, *supra*, is certainly consistent with all the decided cases and it may be that—always subject to the two negative tests—he has in fact supplied the elusive definition. Whether he has done so or not, the writer will not here presume to say. "It is to my mind not possible, nor would it be wise", said Lord Hanworth, M.R., in *Melville v. Melville*, *supra*, at p. 172, "to attempt to give a precise definition of the settlements which come within the purview of this section", and it would be presumptuous for the writer to rush in where Lord Hanworth feared to tread.

DAMAGE BY FROST

By J. T. PLUME, Barrister-at-Law

The consideration of the question of the liabilities and rights of landlord and tenant in relation to damage by frost brings one face to face with the unsatisfactory state of the law with regard to repairing obligations in general. There is perhaps little difficulty where there is an express and unqualified obligation to repair either on the landlord or the tenant. The difficulty arises in cases where an express covenant is limited or qualified by such words as "fair wear and tear excepted" or where there is no repairing covenant at all and where one has to consider such covenants as are implied by law.

There are innumerable ways in which frost may cause damage to premises, but they may perhaps be conveniently summarised under two heads—(a) where a water pipe bursts and damage is caused by the escape of water, and (b) where frost gets into, say, a damp wall and causes it to crumble or buckle.

If there is an express covenant by the tenant to repair and it is qualified by the addition of such words as "fair wear and tear excepted", is he liable for any damage brought about by frost? The question seems never to have been considered by the Courts in any decided case and a study of the Court of Appeal case of *Taylor v. Webb*, [1937] 2 K. B. 283, shows that it is capable of no easy answer. In that case the lessor had undertaken a repairing covenant to the exclusion of fair wear and tear. In the ordinary course of events the nails holding the slates on the roof had become corroded, resulting

in the slates slipping and water entering the house. No repairs were effected and in the course of time the house became ruinous and uninhabitable as a result of the action of the elements. The Court held that the lessor was under no liability. In the course of his judgment Slessor, L.J., said, "So dealing only with the effect of the passing of time and the weather, I agree with Salter, J., in *Haskell v. Marlow* that the words 'fair' and 'reasonable' cannot appropriately be used to qualify the forces of nature and that in such context they can only mean the natural action of the elements. Treating the word 'fair', therefore, in the absence of any question of human user of roofs and walls as applied to the question of physical exposure, as synonymous with 'normal', that is what the parties would reasonably anticipate. The facts of this case seem to me to bring the absence of repair, resulting in the deterioration of the walls and roofs, directly within the exception which excludes the landlord from the obligation of reparation". The learned Judge then goes on to deal with the consequential damage and expressed the opinion that the landlord, being under no obligation to repair the original damage, could not be under any obligation to repair further damage which resulted. Scott, L.J., doubted whether "fair" and "reasonable" could refer in the case of a tenant's covenant to any damage than that actually caused by the tenant; he asked how such adjectives could refer to the actions of the elements. Farwell, J., expressed the position in this way, "the lessor is under no liability for disrepair solely due to such ordinary natural causes as may fairly be said to have been in the contemplation of the parties, for example, wind and weather assuming no abnormal use of the property by him". It is submitted that in view of the judgments of Slessor, L.J., and Farwell, J., in this case and upon consideration of such earlier authorities as there are, that a lessee is under no liability to repair where damage has been done to the structure of a building as a result of the action of frost provided that such damage has not been brought about by any unfair or unreasonable user by the tenant. For instance it might well be that a tenant is liable if he negligently allows water to escape on to the outside walls of a building and damage is caused by the action of frost of such water and the resultant dampness in the walls.

What of the liability of the tenant holding under such a covenant where pipes burst and damage is done by escaping water. Some guidance is to be found in the case of *Citron v. Cohen*, 36 T. L. R. 560. In that case an outside water pipe, which was under the control of the landlord, burst and the demised premises were damaged as the result of flooding. The landlord was under no liability to repair. The tenant's obligations extended only to the interior of the premises. The tenant took no steps to prevent the escape of water other than to warn the landlord. It was held by Sankey, J., that the tenant was under no liability to repair the pipe and consequently that he was relieved of liability to repair damage to the interior of the premises in view of the fair wear and tear clause. However, it is thought that the position would have been different if the pipe had been inside the demised premises and had been part of the subject-matter of the tenant's obligation to repair. Would the tenant then have been relieved of any liability to repair by reason of the fair wear and tear clause? Gleaning

what guidance one can from the authorities it is suggested that the tenant may not be liable if a pipe bursts and damage is caused by the water then in the pipe being emptied into the demised premises. If on the other hand the tenant leaves the premises in frosty weather without turning the water off at the main or, knowing that the pipes are frozen, takes no such steps and then a pipe bursts and a continuous flow of water is allowed to pour over the premises, then it may well be that he would be liable for such damage as followed. In such a case it is felt that although in the first place the burst is caused by the action of the elements the real damage to the premises is caused by the tenant's unfair or unreasonable user in keeping the water supply turned on at a time when or in such circumstances as a prudent and reasonable tenant would have kept the water turned off at the main. However, the question is one which is not covered by authority nor is it one upon which the authorities give any really clear guidance.

Turning now to the case where there is no express covenant relating to repairs and one has to rely on such obligations as are implied by law. Summarised briefly, the implied obligations in the case of a tenancy from year to year are that the tenant shall use the demised premises in a tenant-like manner and that he will keep them wind and water-tight. In the case of a tenancy for years the liability of the tenant is not clearly defined, but it would seem that he is liable for permissive waste. In neither case, apart from statute, has the landlord any obligations towards the tenant whatsoever. This being so, is a tenant liable for damage by frost brought about in either of the ways indicated above? Here again there is little authority from which to obtain guidance. It is suggested that in the case of a tenancy from year to year the tenant is not bound to repair where frost has, for instance, got into one of the walls as a result of which it has crumbled and eventually fallen. The implied covenant for tenant-like user would, it is submitted, not extend to rebuilding a wall which had been damaged or destroyed by the action of the elements and through no fault of the tenant himself. It is true that if such a tenant commits voluntary waste he must make good the damage, but he is not liable for fair wear and tear: *Ferguson v. —* (1797), 2 Esp. 590. If the damage is caused through the bursting of a water pipe which is under the tenant's control, it is suggested that the test to be applied is whether the damage would have been caused if the tenant had looked after the premises in a tenant-like manner. The element of reasonableness must be considered. Did the tenant take such steps as a reasonably-minded occupier of land would have done to prevent the damage. Thus in the Scottish case of *Mickel v. M'Coard*, [1913] S. C. 896, it was held that a tenant who left a house unoccupied for a week in frosty weather and took no steps to turn the water off at the main was liable for the damage which resulted when a pipe burst allowing water to escape for some considerable time. In the course of his judgment in that case Lord Salvesen said: "But then I think according to the rule laid down by Erskine, that a tenant must use a reasonable degree of diligence in preserving the house from injury".

The position of a tenant for years is even more obscure. It is clear that such a tenant is liable for permissive waste: *Yellowly v.*

Gower (1855), 24 L. J. Ex. 289. It is submitted that similar considerations would apply to the question of damage resulting from a burst pipe as in the case of a tenant from year to year. However, what if a wall is damaged or ruined! The authorities are singularly silent and one looks in vain for guidance. On principle it is suggested that such a tenant should take such reasonable precautions as are necessary to prevent any slight damage which the elements may have caused from spreading and becoming major damage, but that he is not bound to go to the extent of rebuilding if the initial damage is so severe as to make such a course necessary. In any event the Court must consider all the surrounding circumstances and in particular the age and condition of the premises.

In conclusion reference must be drawn to the statutory provisions relating to repair which are contained in the Housing Act, 1936. By section 2 the law implies an undertaking on the part of a landlord of a house let at a rent within the prescribed limits that he will keep it throughout the tenancy in all respects reasonably fit for human habitation. By section 9 a local authority have power to compel either the owner or the occupier of a house which is occupied by, or suitable for occupation by persons of the working classes, and do such repairs as may be necessary to render it fit for human occupation.

THE DURATION OF LICENCES

By E. O. WALFORD, LL.D., Solicitor

The House of Lords having reversed the decision of the Court of Appeal in *Winter Garden Theatre v. Millenium Productions, Ltd.*, [1946] 1 All E. R. 678, on appeal [1947] 2 All E. R. 331, a post-script to the article on the Nature and Effect of Licences, which appeared in the *Conveyancer* for March, 1947, may not be unwelcome. That article dealt at length with the characteristics of licences, but touched very briefly the question of their determination or duration.

THE WINTER GARDEN CASE

The main points in connection with the *Winter Garden Case* were whether the licence could be determined at all by the grantors and if so what notice to determine it was necessary. In that case the licence was to operate for a specified period with options which were exercised by the licensees, the final option giving to the licensees the right of "further continuing the licence" without specifying the further period, the licensees (but not the grantors) being given the right to determine the licence by a fairly short notice. The Court of Appeal considered that the grantors could never determine the licence; but the House of Lords unanimously reversed the decision of the Court of Appeal and held that the licence was determinable by the grantors by reasonable notice. In the particular circumstances one month's notice was held to be sufficient.

DURATION OF LICENCES

There is, of course, nothing to prevent a person from granting to another a licence in perpetuity, even if it is a licence to occupy land. A licence operates by way of contract, and no question of infringement of the rule against perpetuities arises. Although a licence operates contractually no contractual obligation to create a recognised interest in land is created by a true licence. It seems doubtful whether the repetition of the oft-quoted statement that a licence is "by nature revocable" is of any real assistance. That statement must be qualified immediately by the further statement that nothing in its nature prevents it from being irrevocable (*a*), and that a licence coupled with an interest is irrevocable: see the article above mentioned (*Conveyancer*, March, 1947).

A PERPETUAL LICENCE

In *Llanelly Ry. and Dock Co. v. L. & N. W. Ry.* (1874), L. R. 7 H. L. at p. 567, Lord Selborne said:—

"An agreement *de futuro* extending over a tract of time which, on the face of the instrument, is indefinite and unlimited must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto. So far as the words go, there is here no limit; and if any limit or the power of fixing a limit, is to be implied, it can only be in one or other of these two ways."

If that passage is intended to suggest that the circumstances relating to the grant of the licence and its operation are not material it is clear that the noble Lords who delivered opinions in the *Winter Garden Case* did not accept such a suggestion. Indeed, in connection with the *Llanelly Ry., etc., Co. Case* it appears from the opinions of their Lordships that one circumstance which had materially influenced them was the fact that there was bound up with the written agreement between the Llanelly Co. and the L. & N. W. Ry. a loan by the latter company to the Llanelly Co., although their Lordships did not rest their decision upon that fact. The Lords Justices had decided previously (L. R. 8 Ch. App. 942) that "evidence of the advance of £40,000 having been *the consideration for the agreement* was admissible" (see L. R. 7 H. L. at p. 553). By the agreement between the two companies the L. & N. W. Ry. was to have running powers over the Llanelly's Co.'s lines, and the Llanelly Co. could require the L. & N. W. Ry. to carry passengers and goods for the Llanelly Co. upon the Llanelly Co.'s lines. The agreement contained no statement of the period during which it was to endure nor any provision for terminating it.

It was in those circumstances that their Lordships held that the Llanelly Co. could not terminate the agreement as they had purported

(a) Irrevocable may mean "incapable of effective revocation" (*i.e.*, in cases where the Court will grant an injunction to restrain its revocation or action in pursuance of a purported revocation); or it may mean "not lawfully revocable" (*i.e.*, where the only remedy of the licensee lies in the recovery of damages, although the revocation is effective to determine the licence). This distinction will be clear from the subsequent observations in this article.

to do, the agreement being held to be binding in perpetuity on these two statutory companies whose operations might be expected to endure, if not in perpetuity, at least for a lengthy and indefinite period. It is impossible to read the judgments without observing that their Lordships were much impressed by the £40,000 loan made by the L. & N. W. Ry. to the Llanelly Co. and considered that if the agreement were held to be revocable immediately, great injustice might be done to that company, which in the opinion of their Lordships had given consideration for the facilities in question upon the footing that the agreement was intended to be perpetual.

LICENCE OR AGREEMENT

It may be remarked here that a true licence is rightly said to operate contractually. If the licence is under hand and no payment has been made by the licensee nor any detriment suffered by him, it is, however, difficult to see how the licensee can find any complaint in law if the licensor chooses to revoke the licence, even if he has promised that it shall remain in force for a specified period and nevertheless revokes the licence before that period has expired.

But in cases where there is consideration and the parties to the so-called licence have entered into mutual obligations, it is easy to recognise the transaction as an agreement. There may still be difficulty in determining the effect of the agreement and even its duration; but if it does not contain any express provision which enables either party to give notice determining it then (in the absence of an established rule of law governing particular classes of contract) it will not be suggested that either party can lawfully bring it to an end without the concurrence of the other party. When it is necessary to consider whether a permission given by a document is revocable, it is, therefore, necessary to consider also whether that permission or licence is merely part and parcel of a binding agreement. In such cases the acknowledgment of the right of the party who has granted the licence to revoke is tantamount to the acknowledgment of his right to repudiate the agreement as a whole if the licence is an essential feature of the agreement. A statement that a licence is "by nature revocable" must therefore be viewed with suspicion. It is not surprising to find that the Courts have in modern times come to the conclusion that there is nothing to prevent them from protecting a licensee against the wrongful revocation of a licence by the grant of an injunction if the case is otherwise suitable for an injunction.

It will be observed that the dictum of Lord Selborne in the *Llanelly Case*, above set out, suggests that an "*agreement de futuro*" for an indefinite period must throw upon anyone alleging that it is not perpetual the burden of proving that allegation. As a licence must amount to an agreement or fail, and must necessarily operate *de futuro*, such a statement is equivalent to saying that anyone who alleges that an enforceable licence is not perpetual must prove it. That proposition may be too wide.

A MODERN DOCTRINE

When the opinions of their Lordships in the *Llanelly Case* are compared with modern decisions and in particular with the dicta of

their Lordships in the *Winter Garden Case*, a striking divergence of opinion may be noted.

In the *Llanelly Case* it appears that their Lordships did not consider that there was any choice between the perpetual operation of a licence for an unspecified period or its revocability by immediate notice (b). Lord Cairns, L.C., observed that the agreement was either determinable at the will of the Llanelly Co. immediately after being made "the very day after it was made—or . . . there is no terminus whatever assigned by the agreement or put in the power of either of the parties". And the dicta of the other learned Lords indicate a similar view. From the *Winter Garden Case*, however, it is quite plain that their Lordships did not accept the view that a licence—indefinite on the face of it—must either be determinable forthwith at any moment or perpetual. At least the majority of their Lordships concurred in the view that a term must be implied by law that the licence could be terminated by a period of notice reasonable in point of time, despite the fact that the licence contained no such term nor any means of ascertaining the length of the notice. The fact is that new law has been made in the *Winter Garden Case*. Previously it was considered that the doctrine in the *Llanelly Case* (i.e., of perpetuity or revocability by immediate notice) was correct, though the licensee must be allowed, after the immediate determination of the licence, a reasonable time in which to quit the premises. Now persons who have granted licences will have to consider in each case what date to specify in the notice as the date when it is to take effect. The notice should not purport to determine the licence immediately, "with a right in the licensees to work out the position that existed at the date of the notice". Lord Uthwatt observed that if the last-mentioned course were in order, then where a rent was payable by the licensee the result would presumably be that after the nominal termination of the licence the licensee would not be under any obligation to pay rent, which would not be a commercial proposition. Lord MacDermott was of the same opinion, even though the licensor "may not be fully versed concerning all the relevant circumstances" when considering what period of notice he should give.

PERIOD AND FORM OF NOTICE

In those cases where it does not appear that the parties contemplated the determination of the licence without previous notice, Lord Uthwatt expressed the view that the date at which the notice can expire must be "determined by the [? lawful and reasonable] commitments of the licensees as they stood under the contract at the date of the notice". In his view the licensor must furnish "such information as is requisite for the proper performance of the licensor's obligation", citing for comparison *Mackay v. Dick* (6 App. Cas. 263).

(b) I am not dealing here with cases where the licence is granted to an individual, where it has at all times been clear that the position may be different. It might appear, for example, that the licence was exercisable only so long as the licensee lived (i.e., was personal to the grantee), or was exercisable only whilst the grantee occupied certain property.

APPLICATION OF THE RULE

How does this elaboration of the doctrine of reasonable notice work out? It had already been laid down by the Court of Appeal in *Minister of Health v. Bellotti*, [1944] K. B. 290; 113 L. J. K. B. 436, that where a licence to occupy premises is revoked by a notice which does not give the licensee a reasonable time in which to vacate the premises, the licensee does not commit trespass by remaining until a reasonable time has elapsed to enable them to leave. Of course, in the case of a lease, if the lessor purports to determine the lease by a notice which does not expire on the correct date it is entirely ineffective, and the term of the lease continues as if no notice had been given. In the case of the premature determination of a licence the position does not appear to be the same: for in the *Bellotti Case supra*, it was held that as, by the time proceedings were commenced by the Minister, a reasonable time from the giving of the notice had in fact expired, the licensor was entitled to an injunction to restrain further occupation of the premises. Having regard to the observations of their Lordships in the *Winter Garden Case* it would seem necessary to qualify the view which was expressed in the Court of Appeal in *Thompson v. Park*, [1944] 2 All E. R. 477; 113 L. J. K. B. 561, that even if the revocation of a licence is a breach of contract, the licensee must leave the premises after the licence has been revoked. As Lord Uthwatt remarked in the *Winter Garden Case*:

“To my mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorised revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation, and, if the remedy of injunction is properly available in the latter case against unauthorised interference by the licensor, it is also available in the former case. In a Court of equity, wrongful acts are no passport to favour”.

Conformably with that view and other observations of Lord Uthwatt and of Lord MacDermott it would seem that if the licence is one which is enforceable by injunction the licensee may, on premature revocation of the licence, nevertheless “sit tight”, and if efforts are made to disturb him he may reasonably expect the aid of the Court. Presumably in those circumstances any periodical payment would continue to be payable. If, however, the licensee chose to treat the notice as an effective repudiation of the licence and to notify the licensor to that effect, or, if in possession under the licence to vacate pursuant to the notice, presumably the licensee’s obligations would cease and the damages recoverable by him would be ascertained on the footing that the licence had been determined, though wrongfully, at the date specified in the notice. The last proposition is strictly in accordance with the old doctrine that a mere licence amounts to no more than a contract effectively revocable, subject to a possible liability in damages. The newer doctrine, which affords a greater protection to the licensee, need not be regarded as conferring upon a licensee a new kind of interest in land. It is enough to consider it as an example of the methods by which equity will restrain breaches of contract in appropriate circumstances, undeterred, and in fact uninfluenced by the consideration of the question whether, as against the licensor, the licensee is obtaining

the same remedy as equity would afford to a lessee, the grantee of a *profit à prendre*, or some other person having a recognised interest in land. It will be recalled that even centuries ago when a lessee had no true interest in land, he had a remedy in covenant protecting his occupation, the judgment being "that the covenant be held", Bracton's *Note Book*, 1739. After a long and peculiar series of developments the lessee was indeed recognised as holding an estate in land; and it may be that a licensee will in due time be acknowledged as holding such an interest. But there is no need to anticipate history or embark upon speculations as to its course. Those concerned with licences have enough problems to solve when applying the present law! With due diffidence the following rules concerning the duration of licences are submitted.

GENERAL RULES

(1) In general a licence (whether oral, written or under seal) is terminable by notice unless it can be inferred from the terms of the licence, the character of the transaction or the attendant circumstances (including the giving of consideration whether by way of lump sum or periodical payments), that the licence is intended to endure for a definite or ascertainable period or in perpetuity, *Thomas v. Sorrell* (1673), Vaugh. 330; 3 Keb. 264; Freem. K. B. 137; *Wood v. Leadbitter* (1845), 13 M. & W. 838 (approved by Lord Porter in the *Winter Garden Case* as to the statement that a licence under seal (provided it be a mere licence) is [prima facie] as revocable as a licence by parol); *Hewlins v. Shippam* (1826), 5 B. & C. 221; 4 L. J. (o.s.) K. B. 241; *Kerrison v. Smith*, [1897] 2 Q. B. 445; *Canadian Pacific Ry. v. R.*, [1931] A. C. 414; *Llanelly, etc., Co. v. L. & N. W. Ry.* (1875), L. R. 7 H. L. 550.

(2) Whether any and what restrictions exist upon the power of the licensor to determine a revocable licence to occupy land depends upon the circumstances of each case: *Canadian Pacific Ry. v. R.*, [1931] A. C. 414. Immediate notice may not be permissible: it may be that if, for example, poles and wires have been erected under the licence the licence can be revoked only by a notice determining it upon a specified future date such as will give the licensee sufficient time not only to remove the poles and wires, but also to arrange for their erection elsewhere: *ibid.*; see also the *Winter Garden Case*, *supra*.

(3) A licence coupled with a grant is irrevocable. The nature of such a grant and the relevant cases were considered in the above-mentioned article in the *Conveyancer* (March, 1947). It is unnecessary to add anything upon that point except that where a legal interest in land is not conferred by the licence, the licence will not be binding upon a successor in title of the grantor; and that it remains to be decided whether there is any limit of time during which the licence subsists. There would appear to be some very doubtful authority for the view that a right to remove from the vendor's land articles purchased from him endures only for such a period as is necessary to enable the buyer to remove those articles: *Webb v. Paternoster*, Palmer 71 (where it would seem that the licence was for a limited time: see *per Alderson, B.*, in *Wood v. Leadbitter*, 13 M. & W. 838).

(4) It is said that a licence executed, as distinct from an executory

licence, cannot be revoked: *Webb v. Paternoster* (1619), 2 Roll. Rep. 143; Palmer 71; *Winter v. Brockwell*, 8 East 308. In the last-mentioned case A had, upon his own land, with the permission of B, filled in a space through which B had previously received light and air. B subsequently took proceedings against A in respect of the enclosure of that space. He was non-suited. It must be noted, however, that the work had been done on A's land. It does not follow that a licence granted by A to B to do something on A's land, *e.g.*, to place a seat on A's land and use it when he thinks fit, is not revocable. This question is more difficult if it is assumed that the thing permitted involves substantial expense, *e.g.*, the erection by B on A's land of a building which becomes part of the land. It is, however, suggested that if no special circumstance (*e.g.*, the giving of some form of consideration) can be found to justify the inference of a right in perpetuity or, say, during the life of B (possibly so long as A also is living and continues to own the land), the licence will be revocable at any time, though not so as to make B a trespasser until he has had time to remove (*c*): see the *Winter Garden Case*.

(5) If the licence (whether oral, written or under seal) is granted for an unspecified period in consideration of the payment of a periodical sum the period of the notice must depend upon the circumstances. In the earlier portion of this article one method of determining that period has been indicated, namely, by reference to the lawful and reasonable commitments of the licensee at the date when the notice is given.

The rules which have been worked out in connection with notices determining tenancies were referred to by Lord Uthwatt in the course of his opinion in the *Winter Garden Case*, [1947] 2 All E. R. at p. 341. His Lordship remarked that:

"The licence here very closely resembles a tenancy under a general occupation, and I would, as respects the nature of the right of the licensors to determine it, apply the principle which governs the right to determine such a tenancy. In my opinion, therefore, a reasonable notice was necessary to determine the tenancy".

That passage must not, however, be taken to mean that a week's or month's notice is necessarily sufficient where a weekly or monthly payment is made under the licence. The notice must in all cases be determined by the circumstances, though the fact that the rent is payable at short intervals is one of those circumstances. It is submitted that if a licensor accepts payment for a period in advance he will not be entitled to determine the licence by a notice expiring before the end of that period. There is, however, no absolute rule concerning the revocation of licences of this class. For example, in addition to the periodical payment a premium may have been paid or the licensee may have *undertaken* to expend a substantial sum in the execution of certain works, or to incur other heavy expenses, and the nature of the use to which the property is to be put may be sufficient to raise the implication that the licence is irrevocable. It would, however, require an extremely

(c) It does not follow that the licence is necessarily irrevocable if consideration is given: see (1) above. Generally on this paragraph see the remarks in the ensuing paragraphs.

strong set of circumstances to raise such an implication: cf. the *Llanelly Case*, *supra*.

(6) The method of determining a licence may, it seems, vary according to the nature of the grant. Thus, in the case of a gratuitous revocable licence it has been said that no express notice is necessary, the licensee acting at his peril on the assumption that the licence is subsisting. Thus, revocation was held to be effective by the locking of a gate: *Hyde v. Graham*, 1 H. & C. 593; 32 L. J. Ex. 27, or by the letting or selling of the grantor's land to another: *Plummer v. Webb*, Noy 98; *Wallis v. Harrison*, 4 M. & W. 538. In the last-mentioned case it was laid down that a licence by parol (*i.e.*, oral or written) does not bind the grantor after he has parted with his interest and possession of the land to a stranger, the principle being that if A voluntarily gave a neighbour a right of way A's purchaser was not bound to continue that facility, and that a person is bound (*i.e.*, deemed by law) to know who is the owner of land in the sense that he cannot answer a claim in trespass by showing leave and licence from a former owner. Where the grant is not for a specified period and is gratuitous and is of a mere licence (and not of a recognised interest in land, such as an easement), the inference may readily be drawn that as the licence would not normally be legally effective after the grantor had sold or let the premises it is not intended to remain in effect after that event. It is impossible to formulate a satisfactory test of the question whether a gratuitous licence is to be construed as operating after the death of the grantor. The answer must always depend upon the circumstances and the words employed. The guess may be hazarded that whilst the licence would normally be determinable forthwith by the personal representatives of the grantor, until such notice was given the personal representatives would be taking a serious risk if they commenced proceedings without first giving notice. It may be that the old cases which entitle a man to determine a courtesy right of way without notice by locking a gate and depriving the grantee of the right still hold good. Probably his personal representatives could determine such a right by similar action. It does not follow that a licence under which a man is in occupation of property by gratuitous licence from A necessarily determines automatically on A's death without notice from his personal representatives, notwithstanding the old case law, that a gratuitous licence is "an authority only with respect to the soil of the grantor, and if the close ceases to be his soil the authority is instantly gone": *Wallis v. Harrison*, 4 M. & W. 538; 8 L. J. (N.S.) Exch. 44. The doctrine that an authority to enter land cannot be revoked so as to make the licensee a trespasser before he has had an opportunity of leaving the land, cannot be effective against a purchaser of the land, because a licensee's rights are merely contractual at best; but it does not necessarily follow that the doctrine does not hold good against the personal representatives of the licensor.

(7) If no payment is made for the licence and it is granted for an unspecified period (whether it is under seal or not) the inference may also readily (but not necessarily) be drawn that the licence is

personal to the licensee and not exercisable by his assignee (*d*), or even by his personal representatives. Different considerations may arise where the grant is for value, whether by way of lump sum or periodical payment, as may be seen by comparing the *Llanelly* and *Winter Garden Cases*, *supra*.

(8) If no payment is made for the licence, and it is not under seal but is granted for a specified period, the position is particularly nebulous. It seems possible only to indicate some of the tests which may have to be applied in order to determine whether the licence may be lawfully revoked (*i.e.*, so as to render any licensee who is entitled to the user of land a trespasser after determination of the licence, and generally to exempt the grantor from liability in damages):—

(a) Undoubtedly some licences are granted as mere social acts. For example, a person who invites others to dine may be said to have granted them a licence to enter his house and consume a dinner of some sort. If, however, for some trivial or arbitrary reason, when they have just commenced dinner, the host requires them to leave they will have no cause of action against him because there is no intention to create a legal relationship. It may well be that other less obvious examples can be found. For instance, a landowner who informs his neighbour that he may put a boat on his lake and use it during the summer is not necessarily liable in damages if the neighbour purchases a boat for that purpose but is unable to use it for the full summer season owing to premature revocation of the licence by the grantor (*e*).

(b) It may, however, be objected in relation to the foregoing examples that as no consideration passes to the grantor there is nothing more than a bare promise by him. Until the grantee has done something in pursuance of the "licence" no doubt there may be some ground for contending that the grantor can, in relation to an offer of a gratuitous licence, revoke that offer effectively if the grantee has done nothing meanwhile to commit himself to expenditure or loss, even though he has formally accepted the offer. Reference has already been made to the proposition that a licence whilst executory is revocable, but a licence executed is irrevocable: *Webb v. Paternoster*, Palmer 71. The first part of that proposition is no doubt true concerning gratuitous licences. The latter part of the proposition is considered in (*c*) below.

(c) It should not be forgotten that a licence which is called

(*d*) There can be no possibility of enforcing a licence against a purchaser of the interest of the licensor unless the right which it purports to grant is capable of subsisting as a legal interest in land. The licence operates contractually, and with the sole exception of restrictive covenants and covenants between lessor and lessee or those made binding in a specified manner by statute the burden of a contract or covenant cannot be made to run with the land affected by it so as to bind a purchaser. There is, however, nothing to prevent a licensee from assigning to another person the benefit of the licence if it is not personal but operates either for a fixed or indefinite period (cf. *Shayler v. Woolf*, [1946] 1 All E. R. 464; 2 All E. R. 54), provided that it is still subsisting. Moreover, although a purchaser or even a voluntary assignee of the land of a licensor will not be bound by the licence, there would appear to be no ground for suggesting that a licence granted for a fixed or indefinite period for valuable consideration or under seal would not be binding on the personal representatives of the licensor. A licence operates contractually, and a contract which is not limited to the lifetime of the contracting party owing to some rule of law (*e.g.*, a contract for personal services) is normally enforceable against his estate, through his personal representatives.

(e) I assume that damages can be proved. The neighbour will, of course, have the boat, but he may not be able to recover his expenses by selling it.

"gratuitous" because no consideration passes to the grantor may in fact be granted for valuable consideration. It is not necessary that any money consideration or other benefit should accrue to one party to a contract in order that he should be bound by it. It is, of course, elementary law, though the point is sometimes overlooked, that a valuable consideration may be a profit or benefit accruing to the one party or "some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other", *Currie v. Misa* (1875), L. R. 10 Ex. at p. 162, *provided that it is a term or necessary consequence of the contract* that such a result is to follow. It is obvious that there is no rule that "a contract executory is revocable, but a contract executed is irrevocable". In relation to licences which are apparently "gratuitous" the answer to the question whether it is binding on the grantor depends upon the answer to another question, namely, "Does the licence amount to a binding contract?" When looking for the answer to that question it must be remembered that "If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise", *per* Dodderidge, J., in *Bagge v. Slade* (1616), 3 Bulstrode 162. Thus, A may grant to B without payment the right to prepare a runway on A's land and to keep B's car upon it during B's tenancy of the adjoining property. If that licence can be read as evidencing a bargain between the parties, meaning, "If you, B, go to the expense of preparing the necessary runway I, A, will permit you to keep your car upon it during your tenancy", there would appear to be a binding contract between A and B if B, within a reasonable time and before A has withdrawn his offer, makes the necessary runway. It is then a "licence executed" (f). There is then a breach by A of the contract if he purports to determine the licence or refuses to allow B to place his car upon the runway (g). The recent dicta of Lord Greene, M.R., in the Court of Appeal in the *Winter Garden Case*, [1946] 1 All E. R. 678, and of Lord Uthwatt in the House of Lords in the same case, if accepted, justify the view that an irrevocable licence implies a negative undertaking, *i.e.*, not to revoke it, and *can* therefore be enforced by injunction, and if the grantor does revoke the licence he *may* be restrained by injunction from acting upon that purported revocation if the *status quo* has not been altered meanwhile: see the

(f) Cf. *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256. It is probably also a licence coupled with an interest, and therefore not properly revocable during the agreed period for that reason also. It is, of course, possible that the bargain may be made by way of promise for promise. Thus, if A agrees with B in consideration of B's undertaking to construct the runway that B shall have the right above mentioned, then the agreement is complete and effective (as a contract) as from that moment, although it is "executory" and the licence is executory also until the runway is constructed. The question whether the Courts will restrain a breach by injunction is to be determined by the general tests which are applied by the Courts when deciding whether the case is one for an injunction or damages: see the further observations in the text upon this aspect of the matter.

(g) Attention must, however, be drawn to the doctrine of *Jorden v. Money* (1854), 5 H. L. C. 185, namely, that representations by A to B as to A's future intention, unless amounting to an actual term of the contract or an express collateral undertaking or warranty, will not work an estoppel against A or entitle B to any other remedy against him even if the representation was made with the object of inducing B to enter into the contract. There is, of course, an exception in the case of fraud, *e.g.*, if it is shown that A had no such intention; but it is often difficult to prove that A had not the intention in question at the material date

Conveyancer, March, 1947, p. 168. As to the very different question whether an injunction *will* be granted, see *ibid.*, pp. 167, 182, 183, *McManus v. Cooke*, 35 Ch. D. 681; and *Pollard v. Photographic Co.*, 40 Ch. D. at p. 354, where it was pointed out that the right to grant an injunction does not depend in any way on the existence of property, but may be exercised to prevent a wrong, whether arising from breach of contract or of confidence.

(d) Though no payment is made by the licensee, if the licence is granted by deed the seal will import consideration even though the licensee may be put to no expense in the course of the exercise of the licence. It is submitted that if a licence by deed is granted (without monetary consideration) for a fixed period it will be as effective as a licence granted for valuable consideration, except that if it operates as a contract which would have been specifically enforceable (*h*) if valuable consideration had been given, it will not be so enforceable if no consideration moves from the licensee: *Re Lucan* (1890), 45 Ch. D. 470; *Kekewich v. Manning*, 1 De G. M. & G. 188 (*i*). He may, however, be entitled to recover damages if the licence is revoked prematurely. An agreement under seal has always carried sufficient consideration to support an action at law. Equity refused to follow the law, holding that voluntary agreements under seal should not be specifically enforced: *Re Lucan*, *supra*.

Hurst v. Picture Theatres, Ltd.

It may be useful to consider how the decision of the Court of Appeal in *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K. B. 1, now stands, and the extent to which *Wood v. Leadbitter* (1845), 14 L. J. Exch. 161; 13 M. & W. 838, is overruled. It is safe to say that the stock of the *Hurst Case* is definitely rising, but very little was said concerning that case by their Lordships in the *Winter Garden* appeal. Viscount Simon, L.C., regarded that case as rightly decided and repudiated "the view that a licensor who is paid for granting his licensee [*? licence*] to enter premises in order to view a particular event can nevertheless, although the licensee is behaving properly, terminate the licence before the event is over, turn the licensee out, and leave him to an action for the return of the price of his ticket", and he added that in *Hurst's Case* "substantial damages for assault and false imprisonment rightly resulted". Lord Uthwatt thought that it was unnecessary to consider whether *Hurst's Case* was rightly decided. Neither Lord Porter nor Lord MacDermott expressed any opinion concerning *Hurst's Case*. It is, however, fairly well entrenched and the recent dicta may be said on the whole to have added to the revetment already afforded by such decisions as *British Actors Film Co., Ltd. v. Glover*, [1918] 1 K. B. 299, and *Said v. Butt*, [1920] 497, in which Judges of the High Court appear to have viewed it with approval.

Of *Wood v. Leadbitter*, *supra*, it may be said that it would convey

(*h*) So far as I am aware this remedy could arise only in a case where the "licence" was more than a mere licence and operated as a contract to grant a recognised interest in land.

(*i*) It is not a necessary inference that an action to restrain the premature repudiation of a gratuitous licence under seal would necessarily fail, though I do not know of any case in which this point has arisen. The protection of licences by injunction is, however, so modern a growth that it is not surprising if no authority can be found on this point.

an entirely wrong impression to suggest that the well-known judgment of Baron Alderson in that case should be regarded as an exposition of bad law. Whether the result which was arrived at depended or did not depend upon the pleadings (which in my opinion appears to be somewhat doubtful when the full terms of the judgment are considered), I respectfully adopt the words of Viscount Simon (at p. 336):

“It is enough to say that at any rate since the fusion of law and equity no Court in this country would refuse to a plaintiff in Wood’s situation the remedy for which he asked, and the case, in my opinion, should no longer be regarded as an authority”. Whilst the other learned Lords did not expressly subscribe to that view, being of opinion that the *ratio decidendi* in *Wood v. Leadbitter* was not material to the point before the House in the *Winter Garden Case*, nothing is to be found in their judgments which appears to conflict with the view of Viscount Simon as above expressed; and much which appears to support it is to be found in the judgments of Lord Porter and Lord Uthwatt.

A FINAL REFLECTION

There is no doubt that the legal position of licensees in general has much improved since *Wood v. Leadbitter*, particularly where consideration can be shown. Apart from the remedy of damages for breach, the licensee who is wrongfully evicted may be entitled to recover damages or may be entitled to an injunction restraining the licensor from interfering with the exercise by the licensee of his rights under the licence. Nevertheless, if, as in *Thompson v. Park*, [1944] 2 All E. R. 477, the licence is not one which the Court will protect by injunction, it follows that the continued occupation of or exercise of rights over land by the licensee is unlawful after the licence has been determined. Hence, where a licence authorising such occupation or exercise is revoked it is not merely the licensor who acts at his risk in deciding what period of notice, if any, is necessary. The licensee, if ignoring the notice, or treating it as too short, also acts at his own risk, as he may find that although he is entitled to damages in respect of breach of contract, he may have to bear the costs of an action by the licensor for possession, or of an injunction restraining him from further exercising the right conferred by the licence: it is submitted that the judgment of Goddard, L.J., in *Thompson v. Park*, *supra*, affords sufficient authority for that proposition.

THE POSITION OF A BENEFICIARY WITHIN THE MARRIAGE CONSIDERATION UNDER AN INCOMPLETELY CONSTITUTED TRUST

By J. G. FLEMING, M.A., Barrister-at-Law

It is axiomatic that Equity endeavours to prevent a person entitled to its protection from sinking to the level of an unsecured creditor. It is proposed to examine briefly the extent of this proposition in relation

to the rights of a person within the marriage consideration under an incompletely constituted trust. Although it is commonly believed that such beneficiary is in as secure a position as a volunteer claiming under a completely constituted trust, this assumption requires closer scrutiny than it receives in contemporary works of authority.

It may be stated beyond fear of challenge that the covenantor can be compelled to execute the settlement in accordance with the terms of the contract, as long as the remedy of specific performance is available (*per* Cotton, L.J., in *Re D'Angibau* (1880), 15 Ch. D. 228), and in cases where the grantor entered into a covenant to settle after-acquired property (as in *Pullan v. Koe*, [1913] Ch. 9), or an expectancy (cf. *Re Lind*, [1915] 2 Ch. 345), the trustees or beneficiaries are entitled to take immediate steps on the acquisition of such property or the falling in of the future interest to insist on their transfer to the trustees. We must tread more warily, however, in the not infrequent situation where the trustees have failed to perform their clear duty of reducing the trust property into possession (a), and this course has become impossible at the date of the proceedings because the fund in question is no longer available for this purpose. The cases are not of unqualified assistance on the issue whether the character of constructive trustee may, for all purposes, be attributed to the covenantor with regard to property which is or was caught by the terms of the contract (b), or whether the covenant can give rise only to a common law action by the trustees for the recovery of a specialty debt.

In *Spickernell v. Hotham* (1854), Kay 669, by a marriage settlement of 1828, A covenanted to transfer £962 New 4 per cent. Annuities *belonging to him* to the trustees for the benefit of his intended wife and the issue of the marriage. The fund was not transferred in A's lifetime, and the trustees instituted proceedings in 1854 to recover its value from his personal representatives. The exceedingly inadequate report does not disclose whether the annuities were still in existence at the date of A's demise, but as Swinfen Eady, J., explained in the later case of *Pullan v. Koe* (*supra*, at pp. 15-16), it appeared from the Master's Report that they had been converted into New 3¼ per cent. Annuities by the covenantor but had been dissipated beyond the possibility of tracing at the crucial date of the proceedings. Page Wood, V.-C., rejected the claim of the trustees and adverted to the problem in these words: "Here the sum of stock which ought to have been brought into existence as a trust fund never had any such existence. . . . The *cestuis que trust* could not get at the fund in any other way than by an action to be brought by the trustees; therefore it is not in any sense a trust on the part of the testator, and the action upon the covenant is now barred by the statute" (p. 675).

These terse remarks would point to the conclusion that, since the

(a) This constitutes a breach of trust. *Re Strahan* (1856), 8 De G. M. & G. 291; *Re Brogden* (1888), 38 Ch. D. 546. But their liability will frequently be barred by virtue of s. 19, Limitation Act, 1939.

(b) We are not concerned here with covenants to which the doctrine of performance is inapplicable. There is a clear distinction between covenants to settle specific property, all future acquisitions or property already belonging to the covenantor on the one hand, and general covenants on the other. Cf. Lord Hardwicke's exposition of the relevant principle in *Deacon v. Smith* (1746), 3 Atk. 323, 327.

trust was not completely constituted, the subject-matter of the covenant did not become trust property, and thus leave the beneficiaries to a bare action at law at the instance of the trustees for the recovery of a specialty debt. It patently ignored the circumstance that specific performance would, at one time, have been available to compel the covenantor to transfer the stock to the trustees, and does not disclose whether the fact that the fund had been dissipated, materially affected the position. Carried to its logical conclusion, the decision ignored the fundamental distinction between beneficiaries within the marriage consideration and volunteers, since it was to all appearances common ground at that period that the trustees of a purely voluntary settlement would not have been debarred from suing the grantor at law (c).

This unfortunate impression of the decision in *Spickernell v. Hotham* was to some extent removed by Swinfen Eady, J., in *Pullan v. Koe* (*supra*). There a marriage settlement of 1859 contained the usual covenant to settle the wife's after-acquired property. In 1879 the latter received £285 and paid the sum into her husband's *general* bank account. Part of it was shortly afterwards invested in the purchase of two bearer bonds which were not, however, transferred to the trustees of the settlement. The learned Judge held that, notwithstanding the lapse of time, the trustees were entitled on behalf of the persons within the marriage consideration to follow and claim the bonds as *trust property*, although their legal remedy on the covenant was clearly statute-barred. "It was contended that the bonds never became trust property, as both husband and wife were only liable for breach of covenant, and that the case was different from cases where property which had once admittedly become subject to the trust of an instrument had been improperly dealt with, and is sought to be recovered. . . . As soon as the £285 was paid to the wife it became in Equity bound by and subject to the trusts of the settlement. The trustees could have claimed that particular sum, could have obtained at once the appointment of a receiver of it, if they could have shown a case of jeopardy, and if it had been invested and the investment could be traced, would have followed the money and claimed the investment" (pp. 13-14). Swinfen Eady, J., distinguished the earlier decision on the ground that there had been no question of following the stock as it had been dissipated, and the claim was therefore reduced to a bare money demand. His emphasis on the one-time availability of specific performance, and the applicability of the maxim that Equity regards as done that which ought to be done in favour of a purchaser or beneficiary within the marriage consideration, placed the distinction between the former and pure volunteers in its correct perspective, and established the proposition that the subject-matter of the covenant to settle is regarded as trust property at the moment when it becomes available for performance. In the words of Jessel, M.R., in *Smith v. Lucas*, 18 Ch. D. 531, 543, "the covenant binds the property under the doctrine of Equity that that is considered as done which ought to be done. That is in the nature of specific performance of the contract". This proposition was reiterated by Eve, J., in *Re Pryce*, [1917] 1

(c) This view was not exploded until the decisions in *Re Pryce*, [1917] 1 Ch. 234 and *Re Kay's Settlement*, [1939] Ch. 329.

Ch. 234, 241 : "The Court would . . . compel fulfilment of the contract to settle at the instance of any person within the marriage consideration and in their favour will treat the outstanding property as subjected to an enforceable trust".

This decision has not, however, removed all doubts, since the explanation of *Spickernell v. Hotham* (*supra*) vouchsafed by the learned Judge appears to suggest that the scope of equitable protection is limited to cases where tracing is still within the realm of possibility, but that, where the fund which was at one time caught by the covenant has been dissipated, the beneficiaries are thrown back on their *legal* remedy on the covenant. This is to some extent corroborated by the reflection that the trustees in *Pullan v. Koe* (*supra*) did not attempt to recover that part of the sum of £285 which had not been employed to purchase the said bonds. It is submitted that this distinction is unsound. We must take the rind with the fruit. This was indeed recognised by the future Lord Russell, counsel for the unsuccessful defendants in *Pullan v. Koe*, who pointed out that, had the covenant in *Spickernell v. Hotham* been regarded as creating a trust of the stock, the settlor would have been considered as an "express" trustee (*d*) and the Statute of Limitation ought not to have applied. Where a person has in his hands trust property with knowledge of the existence of the trust, lapse of time is no bar to a claim for repayment. Moreover, the method of tracing employed in *Pullan v. Koe*, *i.e.*, tracing through a general account into specific investments, can be explained only on the supposition that the covenantor was regarded as a constructive trustee (see *Re Diplock*, [1947] 1 All E. R. 522). It is impossible, therefore, to impose too narrow a construction on Mr. Justice Swinfen Eady's initial remarks that "the husband received the bonds knowing that the £285 and the bonds purchased with part of it were bound by the covenant, and moreover he gave no value, but is in the position of a volunteer. The trustees having traced the property into his hands are entitled to it". The husband was not only a volunteer, but a constructive trustee of the fund and therefore liable for its restitution in specie, so far as tracing permitted, and to repayment in any event, irrespective of the fact of dissipation and lapse of time. The covenantor's position is identical with that of a person who knowingly receives trust funds from the trustees under a completely constituted trust, as in *Coxwell v. Franklinski* (1864), 11 L. T. 153, where money had been lent to the beneficiary's husband by virtue of a power contained in the settlement. Upon these facts, Kindersley, V.-C., held that he was a constructive trustee and that lapse of time was not a bar to recovery. "It was a trust fund, known by the husband to be a trust fund, received by him as part of a trust fund, in his hands as part of the trust money, and until it was repaid, retained the character of trust money. In fact, the husband himself was constituted a quasi-trustee of this fund. He had it in his own hands, and although he was not the trustee of the settlement, he made himself liable to the *cestuis-que-trust* who, after his death, were entitled to this fund" (at p. 154). The liability of a constructive trustee in these circumstances has not

(*d*) *I.e.*, an "express" trustee within the scope of the decision in *Soar v. Ashwell*, [1893] 2 Q. B. 390, in the sense of one whose liability was not affected by statutes of limitation prior to s. 8 of the Trustee Act, 1888.

been curtailed by the Limitation Act, 1939, since under section 19 (1), "no period of limitation shall apply to an action by a beneficiary under a trust, being an action . . . (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use" (e).

A latent difficulty remains on this view of the authorities, with reference to covenants to create a settlement in favour of persons within the marriage consideration, coupled with a remainder in favour of volunteers. If such trust has not been completely constituted, then during the existence of the former class of beneficiaries, the covenant would have been specifically enforceable and the grantor be considered as holding the property on trust. At the moment of their deaths, however, or even during their lifetime, provided their position would not have been improved by the execution of the covenant (see *Re Pryce*, [1917] 1 Ch. 234, 241), the remedy of specific performance would lapse, since Equity will not intercede in favour of volunteers, with the result that the trustees are not even compellable to sue upon the covenant at law (f). This situation invokes the odd proposition that the covenantor may be a constructive trustee for limited purposes or a limited period of time, and is in point of theory irreconcilable with the reasoning in *Pullan v. Koe*; since, as in *Re Plumtre's Settlement*, [1910] 1 Ch. 609, on the fund falling into possession during the wife's lifetime, the contract to settle after-acquired property would have been specifically enforceable and was therefore notionally appropriated as trust property under the covenant (g). It is conceived that this inelegance does not weaken the authority of *Pullan v. Koe* or the view advanced in this article, but rather casts a reflection on the soundness of the reasoning which led to the regrettable results in *Re Plumtre* and *Re Pryce*.

NOTES OF RECENT CASES

1. LAW OF PROPERTY AND CONVEYANCING

Joint tenancy of personal property—severance by a course of dealings.—*Re Denny*, [1947] L. J. R. 1029, concerns the severance of joint tenancy in personal property, but this topic is now also of vital importance in the land law, because beneficial joint tenancy in realty is in law a beneficial interest in personalty and can correspondingly be severed by the same means. In *Re Denny*, *supra*, the joint tenancy arose under a residuary gift in a will and during their lifetime the joint tenants had realised and distributed the assets, but after the death of the last surviving joint tenant another sum of money fell into residue. Jenkins, J., held that on the evidence there had been a course of dealings with the property forming

(e) S. 31 (1), Limitation Act, 1939, incorporates the definition of trustees found in s. 68 (17), Trustee Act, 1925, which includes constructive trustees.

(f) *Re Pryce*, *supra*; *Re Kay*, [1939] Ch. 329; but see F. E. Farrer, 4 Conveyancer (N.S.) 71.

(g) Cf. the argument on behalf of the next-of-kin in *Re Plumtre's Settlement*, [1910] 1 Ch. 609, 614.

part of the residue that showed an intention to sever and did operate as a severance.

Joint tenancy in personalty is comparatively rare and perhaps it is not surprising that the authorities on the subject are not many. In this case it is significant that Jenkins, J., could only find three authorities of assistance and that the most recent of these was dated 1862, and this case (*Leake v. Macdowall* (1862), 32 Beav. 28) was distinguished. From *Williams v. Hensman* (1861), 30 L. J. Ch. 878, the learned Judge cited the following principles: "A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right of survivorship only in the event of no severance having taken place of the share, which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as a tenancy in common. When a severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to a particular share, declared only behind the backs of the other persons interested". We may add that, in the case of a joint tenancy in the proceeds of sale under a statutory trust for sale, the joint tenancy may also be severed by written notice served on the other joint tenants under the Law of Property Act, 1925, s. 36. This last case differs from the second head in the quotation on two points: first, there does not have to be agreement; it is unilateral; and, secondly, it does require to be in writing.

The dealings in *Re Denny*, *supra*, were comparatively numerous and it may be assumed that this inference is not to be lightly drawn merely because part of the property is realised and the proceeds distributed equally. Nevertheless, perhaps the most important aspect of this decision is the point given to observations made before in this Journal about the unsatisfactory nature of the provisions of the Law of Property Act, 1926, relating to conveyances by sole surviving joint tenants. We can only say once again that from the purchaser's point of view he should always obtain the appointment of an additional trustee and in reliance on section 23 of the Law of Property Act, 1925, take a conveyance from them as trustees for sale: for precedent containing appointment of new trustee and conveyance see Vol. 11, p. 379.

(1 K. & E., p. 700)

New towns—necessity of consultation before Order.—The fate of applications to quash the Orders for new towns under the New Towns Act, 1946, is not likely to encourage further applications. It becomes increasingly clear that the Act gave few rights to opponents of ministerial action and the Courts have shown little anxiety to extend them. In *Rollo v. Minister of Town and Country Planning*, [1947] 2 All E. R. 488, and *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All E. R. 496, the substance of the complaint was the failure to hold adequate consultation with the local authorities in accordance with the New Towns Act, s. 1 (1). In neither case did Morris, J., sustain the objection and in the latter case he went so far as to suggest that a consultation held prior to the passing of the Act might be a consultation within the meaning of the section. The learned Judge said (at p. 500): "The word 'consultation' is one that is in general use and that is well understood. No useful purpose

would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events and it cannot be conclusive either way according to whether parties said in terms that a consultation under section 1 of the Act was taking place, or to take place, or was intended, or whether nothing relative to this was said at all". He did, however, also deal *obiter* with the proposition that if there was a local inquiry and a local authority appeared and made certain contentions that this would constitute consultation. He said (at p. 496): "I do not accede to this submission. In a particular case it might happen that a local authority would impart the same information when appearing at a local inquiry as if it were consulted, but, in my judgment, the statutory duty of the Minister to consult does not disappear, or is not performed, merely because a local authority embraces the opportunity to make a statement at an inquiry . . .". Nevertheless, it is apparent that the Court cannot control the effect of the consultations (*Robinson v. Minister of Town and Country Planning*, [1947] 1 All E. R. 62 (*ante*, p. 62)), nor can it really interfere with the local inquiry, since it is not really a quasi-judicial process: *Franklin v. Minister of Town and Country Planning*, [1947] 2 All E. R. 289 (*ante*, p. 62). The cases here noted are just further instances of the fact that these decisions and the proceedings, statutory or otherwise, which precede them belong to the realm of administrative action and are not legal proceedings. It is, indeed, doubtful whether they serve a legal, as distinct from administrative or political, purpose at all.

Animals—"unlawful and malicious killing"—defence of rights in game.—*Gott v. Measures*, [1947] 2 All E.R. 609, may be shortly noted as of interest to landowners. The defendant was prosecuted under the Malicious Damage Act, 1861, for shooting a dog which was chasing game. The owner of the dog had repeatedly been warned about the dog's trespassing, but the defendant only had full sporting rights over the land. A Divisional Court held that the offence was proved because it was no justification to shoot a trespassing animal in defence of game (without being the owner of the land), because there was no property in game. The mere fact that the defendant honestly thought that he had a property in the game was no protection. This case definitely lays down that the *dictum* of Coleridge, C.J., in *Daniel v. Jones*, 2 C. P. D. 351, is too wide. On the other hand, it is equally clear law that if the person shooting a dog honestly believes that it is the only way to protect his property, *e.g.*, his sheep, he is not guilty of an offence.

Sale of land—breach of contract to give possession—damages.—In *Beard v. Porter*, [1947] 2 All E. R. 407, the Court of Appeal held that where a contract to give vacant possession was broken so that the purchaser had to buy himself another house he could recover as damages: (i) the difference in price between the house with and without vacant possession; (ii) the cost of his lodgings between the date on which vacant possession was to be given and the date on which he went into possession of his new

house; (iii) solicitors' costs of purchasing the new house; and (iv) stamp duty on the conveyance. The case is not very fully reported on the facts, but apparently the second house was similar in character to the first. This appears to be very material with regard to the last two items, and, indeed, Evershed, L.J., dissented from his learned brethren on these items and held that they were separate from the contract and in any case too remote. Tucker and Somervell, L.JJ., on the other hand, took the view that neither the costs nor the stamp duty added to the value of the second house and that they were expenses to which the purchaser had been put by breach of contract and so recoverable. It is respectfully suggested that if the vendor knew the house was purchased for the purchaser's occupation they were expenses which, in present conditions, he might reasonably have expected to flow from the breach of contract. Somervell, L.J. (at p. 408) carefully points out that no point was taken that the second house was other than similar to the first. If the purchaser had had to buy a still more expensive house other problems might arise or at least this seems to be so, at least so long as one of the few ways of acquiring a house to live in is to purchase it with vacant possession.

Settled land—apportionment of compensation under the Coal Act, 1938.
—*Re Duke of Leeds's Will Trusts*, [1947] L. J. R. 1141, and *Re Lucas's Will Trusts*, [1947] L. J. R. 1153, are primarily concerned with the proper apportionment under a settlement of compensation in accordance with paragraph 21 (2) of Schedule III, Part IV of the Coal Act, 1938. As such they do not concern the general body of conveyancers and details need not be set out here, but they are of more general interest showing some of the difficulties likely to arise under more general legislation, such as the Town and Country Planning Act. Shortly put, the Coal Act provisions contemplate coal as a wasting asset the major benefit of which will pass to the early owners under the settlement and in particular the length of time which it would require to work out the coal is material. There is nothing new in this idea which is to be found in the Lands Clauses Act and in the Settled Land Acts of 1882 and 1925. It is, therefore, interesting to find that Jenkins, J. (who dealt with both cases) examines the cases on the older authorities to observe how they dealt with the problem. The method of apportionment was complicated. In the first place each holding of coal had to be treated separately, primarily because the "life" of each holding would be different and it was upon this "life" that the estimated capital must be exhausted. It was then necessary to work out both income and amount of abatement of capital which would exhaust the fund, interest being reckoned at 3 per cent. Finally, it is of interest to note that although a share of the capital abatement had to be set aside as if there was a mining lease under the Settled Land Act, s. 47, no such amount of income could be set aside because of a prohibition against accumulation of income in paragraph 21 (2). The tenant for life in *Re Duke of Leeds's Will Trusts* was unimpeachable for waste, but there is nothing in the judgment to suggest whether it was argued that the tenant for life should have been treated as working the minerals himself rather than granting a lease. This may have been due to existing leases, of which there were certainly some, but it is not dealt with in the paragraph 21 (2) and it seems open to argument that a tenant for life who can work and take all the profits of minerals should not be debarred from doing so, at least in theory, by compulsory acquisition. It is clear, however, that a good deal more is likely to be heard of these matters with widespread claims under such Acts as the Town and Country Planning Act.

2. CHARITIES

Advancement of religion—trusts for religious communities.—*Re Coats*, [1947] 2 All E. R. 422, is likely to prove an important decision although it purports only to follow *Cocks v. Manners*, L. R. 12 Eq. 574. In fact it operates to apply to religious trusts the requirement of a “public” nature that has recently been applied to trusts for the advancement of education: see *Re Compton*, [1945] Ch. 123, noted *ante*, Vol. 9, p. 152.

In *Re Coats*, *supra*, a declaration of trust of income of money was made in favour of a community of cloistered nuns, but if the gift was not charitable then the income was to be devoted to a named charity. In fact the proceedings appear to be in the form of a test action. The evidence before the learned Judge disclosed that the community comprised “an association of strictly cloistered and purely contemplative nuns who devote themselves entirely to worship, prayers and meditation within the four walls of their cloister, and perform no works and engage in no activities whatever for the benefit of anyone outside their own association, but who are regarded, in the belief and teaching of the Roman Catholic Church, as causing, by means of their private worship, prayers and meditations, the intervention of God to bring about the spiritual improvement of members of the public (both Catholic and non-Catholic) outside those walls, and also as providing an example of self-denial and concentration on the life of the spirit tending to the spiritual edification of such members of the public”. The learned Judge then reviewed the authorities, including some recent cases from Southern Ireland, and held upon this evidence that the trust in favour of the community was not charitable. The grounds of his decision were twofold. First, he held that *Cocks v. Manners*, *supra*, had been approved and was still a binding authority on facts such as these, namely, that “a voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution”: *per Wickens, V.-C.*, L. R. 12 Eq., at p. 585. Secondly, “as regards the public benefit claimed to be produced by the convent, through edification by mere example, this benefit is, in my judgment, too indirect and incidental to convert the main or substantial purpose of the convent from the advancement of religion amongst its own nuns to the advancement of religion amongst the public or a section of the public”: *per Jenkins, J.*, at p. 431.

One argument put forward was that in considering whether a particular religious purpose is for the benefit of the public and, therefore, charitable, the Court will assume that the tenets or beliefs of the particular religion in question to be true. This argument was rejected by the learned Judge, who stated the principle to be applied in these terms (at p. 429): “In considering whether a particular religious purpose is charitable, the Court will assume the advancement of the religion concerned to be beneficial, without inquiring into the truth or soundness of its doctrine or tenets, providing they involve nothing contrary to morals or law”. We might respectfully suggest that there is still a prior question—what is religion? It will be recollected that a trust for founding a training college for the training of spiritualistic mediums failed (*Re Hummeltenberg*, [1923] 1 Ch. 237), yet we feel that one view of spiritualism is that it is a religion.

On the other hand, if the purposes of the proposed charity do advance religion, it is irrelevant that the motive for pursuing them is the spiritual improvement of the members: *Cocks v. Manners*, *supra*; *Re Delany*, [1902] 2 Ch. 642.

It may be noted that one aspect of *Cocks v. Manners*, *supra*, did not arise. In that case it was held that a gift to such an association would be valid if it was not gift of income merely but was a gift of the capital as

well, in which case it became vested in the members of the community at the date of vesting. This is, of course, another aspect of the problem in framing gifts to communities of this character.

(Tudor, p. 15; 2 K. & E., p. 299)

Purposes "beneficial to the community" — evidence.—*Re Strakosch*, [1947] 2 All E. R. 607, is yet another case of a testator's object failing, in the words of the learned Judge (at p. 609), "when a single timely word would have saved it from disaster". The testator directed that a considerable part of his estate should be applied by his trustees "to a 'fund' for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the mother country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking section of the South African community". The timely word in this case would have been "for any *charitable* purpose"! Roxburgh, J., held that purposes which might serve to strengthen the bonds of unity might not be charitable and offered as suggestions the example of greater harmony between Roman-Dutch and English law, improvements in transport or communications, or programmes of trade agreements or tariffs or the organisation of tripartite contests in athletic field between South Africa, England and Holland. He reiterated the proposition that the trust must be both beneficial to the community and charitable. He also pointed out that a trust may be safe if it is given merely to benefit the community; e.g., "to my country England" (*Re Smith*, [1932] 1 Ch. 153), and become not charitable if the method of benefitting is specified; e.g., "for patriotic purposes" in England: *Att.-Gen. v. National Provincial Bank*, [1924] A. C. 262. The learned Judge said (at p. 608): "The explanation seems to be that where no purpose is defined a charitable purpose is implicit in the context (*Williams' Trustees v. Inland Revenue Commissioners*, [1947] 1 All E. R. 513 (noted *ante*, Vol. 11, p. 283)), and the Court will intervene to direct the fund into charitable channels, but if purposes are defined in language which would sanction an application which is not in law charitable, no such implication can be made and the Court will not aid the gift". But from a drafting point of view these questions should not arise. Either the purpose is so clearly charitable that it requires no assistance or else if doubt arises then the draftsman should limit the purposes available to the trustees to "charitable purposes". This may limit their discretion and may even give rise to the necessity of applying for directions, but that is better than total failure.

(Tudor, Charities, p. 37; 2 K. & E. 299)

3. WILL CASES

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law

Condition—whether time of the essence.—In *Re Goldsmith*, [1947] Ch. 339, the testator, who died in 1922, directed his trustees to hold his freehold house upon trust *after the death of his wife* for B, but subject to the payment of £800 to his trustees *within six months of his death* to form part of his residuary estate. The testator's widow died in 1945. B failed to comply with the condition to pay the £800 during her life but offered to pay that sum within six months of her death. Wynn-Parry, J., held that he was too late and that the house fell into residue. There was some

suggestion in the evidence that there had been a slip in drafting the will, but it was too slight to affect the matter and counsel did not argue it. The *ratio decidendi* was that a performance of the condition after the death of the wife could not put the parties in the same position as if the will had been strictly complied with, for payment of the £800 would have increased the residue and so increased the income of the wife as tenant for life.

(Theobald, 10th ed., 450)

Inheritance (Family Provision) Act, 1938.—*Re Inns* (1947), 63 T. L. R. 438, is the first reported case on this Act in which the Court had to consider whether the testator had made reasonable provision for his widow out of a large estate. In the Dominions such cases have caused far more trouble under corresponding legislation than cases where the estate is very small. The estate in this case amounted to over £600,000. The testator gave his house on trust for his wife for life, but tied up in such a way that neither she nor the trustees could sell it during her lifetime. He also gave her an income of £2,500 a year with which to keep it up. Her complaint was that it needed at least £3,500 to enable her to live in the style to which she had been accustomed. Wynn-Parry, J., refused to decide that the provision made for her by the testator was unreasonable.

(Theobald, 10th ed., 76)

Meaning of "investment".—In *Re Power's Will Trusts* (1947), 177 L. T. 245, Jenkins, J., had to consider the meaning of the word "investment" in a will: does it mean only income-producing property, or does it mean non-income-producing property bought with a view to capital appreciation? The learned Judge held that the former was the correct meaning. The testator empowered his trustee to invest in any manner in which he might in his absolute discretion think fit in all respects as if he were the sole beneficial owner, including the purchase of freehold property in England and Wales. The investment clause could hardly have been wider, but Jenkins, J., held that it did not authorise the trustee to buy a house for the occupation of the testator's wife and children. Though the result may have been unfortunate in the particular case, it can hardly be doubted that the narrower meaning which the learned Judge placed upon the word accords best with the view which lawyers take.

(Theobald, 10th ed., 323)

Incorporation of documents.—*Re Edwards' Will Trusts*, [1947] 2 All E. R. 521, is an interesting case in which a testator strove hard but unsuccessfully to reserve to himself the power of making future unattested testamentary dispositions, contrary to the Wills Act, 1837. The testator executed the following documents: (a) a settlement of £100, with his partner L. and his successors as managing trustee and a trust corporation as custodian trustee, in which he reserved power to appoint the £100 by any memorandum under his hand, and in default of appointment gave L. a general power to appoint the £100; (b) a will in which he gave all his property to the trustees of the settlement to be held by them on the trusts and subject to the powers thereof; (c) a memorandum under his hand, dated after the date of his will, in which he purported to dispose of sums considerably larger than £100; (d) a codicil confirming his will. Jenkins, J.,

held, (1) following *Gibbs v. Rumsey* (1813), 2 V. & B. 294, and *Re Howell*, [1915] 1 Ch. 241, that on the construction of the settlement L.'s power of appointment under the settlement was given to him as a trustee *virtute officii* and not personally and was therefore fiduciary and not beneficial, and therefore he could not appoint to himself; (2) that the residuary gift in the will failed because the testator had attempted to reserve power to alter his testamentary dispositions by a future non-testamentary document (*Re Jones*, [1942] Ch. 328); (3) that the codicil confirming the will made no difference to this result: *In bonis Smart*, [1902] P. 238.

(Theobald, 10th ed., 53, 55, 339)

Conflict of laws—renvoi—operation of residuary gift.—*Re Duke of Wellington*, [1947] Ch. 506, is a complicated case which raised three questions of interest and importance, two of which were discussed by the Court. The two questions discussed were (1) the application of the *renvoi* doctrine in the conflict of laws to the validity and effect of a will disposing of land in Spain, and (2) the operation under English law of a residuary devise. The question not discussed was (3) the jurisdiction of the High Court to determine questions of title to foreign land.

The matter arose in this way. In 1812, following the storming of the fortress of Ciudad Rodrigo, the first Duke of Wellington was created a Spanish grandee with the title of Duke of Ciudad Rodrigo. In 1813 certain Spanish estates were adjudicated to the Duke of Ciudad Rodrigo for himself, his heirs and successors. On the death of each of the first five dukes the Spanish estates passed to his successor in the dukedom under his will. On the death of the sixth duke, however, the dukedom of Wellington vested in his uncle under English law and the dukedom of Ciudad Rodrigo vested in the sixth duke's sister under Spanish law. By his Spanish will the sixth duke gave his Spanish estates to the person who would on his decease become Duke of Wellington and Ciudad Rodrigo. There was, of course, no such person, the two dukedoms having become separated for the first time since 1812. The sixth duke subsequently made an English will disposing of all the remainder of his property in trust for the person who on his death should be Duke of Wellington, and specifically excepting therefrom the property disposed of under the Spanish will, which he declared was not intended to be disposed of or dealt with by the English will. By Spanish internal law, the sixth duke could in the circumstances dispose of only half his land in Spain, and the other half passed as on an intestacy. This important fact is not stated in the report, but has been supplied by the courtesy of one of the counsel engaged in the case.

On the death of the sixth duke in 1943 questions arose whether the Spanish estates (a) passed to the sixth duke's uncle under the Spanish or English will, or (b) passed to the sixth duke's sister under the Spanish will, or (c) were undisposed of and passed as on an intestacy under Spanish or English law.

(1) Wynn-Parry, J., held that by English conflict of laws succession to immovables situated in Spain is governed by Spanish law; but the question remained whether "Spanish law" meant the internal law of Spain or whether it meant the whole law of Spain, including its rules of the conflict of laws. There is much to be said for the first view, and it has been said with great force by extra-judicial writers who are specialists in the conflict of laws, for example, Professor Cheshire, Dean Falconbridge and Professor Lorenzen. There is much to be said for the second view, and it has been said by Judges of first instance in at least four modern cases, namely, *Re Annesley*, [1926] Ch. 692; *Re Ross*, [1930] 1 Ch. 377; *Re Askew*, [1930]

2 Ch. 259; *Re O'Keefe*, [1940] Ch. 124; though without much discussion of the theoretical and practical difficulties pointed out by the professors. Wynn-Parry, J., however, held that he was "conclusively" bound by a passage from the judgment of the Privy Council in *Jaber Elias Kotia v. Katr Bint Jiryes Nahas*, [1941] A. C. 403, 413, to hold that the second view was correct. But with deference, neither the judgment nor *a fortiori* the dicta of the Privy Council are "conclusively" binding on any Court sitting in England, not even on the Privy Council itself, though a well-considered opinion is of course entitled to great respect; and in the second place, this particular passage was singularly ill-considered, and has been subjected to devastating and unanswerable criticism by Dean Falconbridge in his recent *Essays in the Conflict of Laws*, pp. 214-220.

Once he had decided that the reference from the English conflict of laws to "Spanish law" meant the whole of Spanish law, including its rules of the conflict of laws, the learned Judge's difficulties began. For Article 10 of the Spanish Civil Code provided that intestate and testamentary succession should be governed by the national law of the deceased. Wynn-Parry, J., assumed that the "national law" of the sixth duke was English law, but he did not explain by what process of reasoning he reached this conclusion. Since English law referred back to Spanish law as the *lex situs*, the question was whether Spanish law would accept this reference back, or *renvoi*; if it would, Spanish internal law would be applicable; if it would not, English internal law would apply.

Faced with the question whether Spanish law would accept the *renvoi*, the learned Judge soon found himself in deep waters; for the Spanish Civil Code and the Spanish Supreme Court were equally silent on the subject, and the expert witnesses held diametrically opposite views. "It would be difficult", he said (at p. 515), "to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction". The two conflicting decisions to which the learned Judge referred were, first, a decision of the Tribunal of First Instance of Barcelona in 1900, that Spanish internal law governed the succession to a domiciled Scotsman who died leaving land in Spain, because Spanish law would accept the *renvoi* from Scots law; secondly, a decision of the Court of Appeal of Granada in 1925, that English law governed the succession to a domiciled Englishman who died leaving land in Spain, because Spanish law would not accept the *renvoi* from English law. The learned Judge found the reasoning in these conflicting decisions equally unsatisfactory; but eventually he reached "the conclusion that it would be against the spirit and intentment of the Spanish Civil Code to hold that, in a case such as this, Spanish law would accept the *renvoi* which the English law makes to it as the *lex situs*". It therefore followed that the validity of the Spanish will was governed by English internal law.

This part of the decision is an excellent illustration of Falconbridge's conclusion (*Essays*, p. 208) that "English Judges have lost their way in a labyrinth into which they have gratuitously entered". Moreover, the authority of the case is weakened by the fact that no one really argued that "Spanish law" in the English conflict of laws rule meant Spanish internal law in the first instance. The argument for an intestacy was that Spanish internal law applied, not in the first instance, but by way of double *renvoi* from the Spanish conflict of laws rule.

(2) By English law it was clear that the gift in the Spanish will failed for uncertainty, since no person fulfilled both qualifications. The question then arose whether it passed under the residuary gift in the English will, or was undisposed of. The general rule is that "if there is a residuary gift, and certain property is excepted from it which is disposed of by a later or earlier part of the will, the presumption is that the exception was made for the purposes of the particular disposition, and if that disposition fails the excepted property passes by the residuary gift": *Theobald on Wills*, 10th ed., p. 177. Wynn-Parry, J., held that the fact that the English will specifically disclaimed any intention to deal with the Spanish estates made no difference, and that they fell into residue. This is a striking illustration of the sweeping operation of a residuary gift.

(3) One point not discussed in the judgment was whether the Court had jurisdiction to decide the case at all, since it involved a question of title to land situate outside the jurisdiction. Dicey says: "The Court has no jurisdiction to entertain an action for the determination of the title to or the right to possession of any immovable situate out of England": Rule 53, citing *British South Africa Co. v. Compania de Moçambique*, [1893] A. C. 602. There are commonly said to be two exceptions to this rule. First, the common law rule does not apply to Admiralty actions *in rem* against a ship to enforce a maritime lien on the ship for damage done to foreign land: *The Tolten*, [1946] P. 135. This exception was obviously irrelevant in *Re Duke of Wellington*. Secondly, the common law rule does not apply to equitable actions *in personam* to enforce some contract or equity against a defendant personally subject to the jurisdiction: *Penn v. Baltimore* (1750), 1 Ves. Sen. 444. But this exception was also irrelevant in *Re Duke of Wellington*, for "there must be some personal element, something more than a mere question of title to foreign land": Cheshire, *Private International Law*, 3rd ed., p. 753, citing *Re Hawthorne* (1883), 23 Ch. D. 743. It is submitted, however, that there is a third exception which, though it is ignored by all the textbooks, is amply supported by authority. This third exception may be formulated as follows: Where the Court is administering an estate or a trust, and the property includes movables or immovables in England and immovables situated abroad which are limited to devolve in the same way, the Court has jurisdiction to determine questions of title to the foreign immovables. The authorities which support this exception are *Nelson v. Bridport* (1846), 8 Beav. 547; *Re Piercy*, [1895] 1 Ch. 83; *Re Stirling*, [1908] 2 Ch. 344; *Re Pearse's Settlement*, [1909] 1 Ch. 305; *Re Hoyles*, [1911] 1 Ch. 179; and *Re Ross*, [1930] 1 Ch. 377. The learned Judge was therefore on firm ground in assuming jurisdiction.

(*Theobald*, 10th ed., 15, 177)

4. FAMILY LAW CASES

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn,
Barrister-at-Law

Validity of marriage by proxy—consideration of public policy in questions of marriage—Apt (otherwise Magnus) v. Apt, [1947] 1 All E. R. 620.—From time to time during the past few years reports have appeared in newspapers of the marriage of persons in England to persons out of England by proxy, correspondence and, in one case, by telephone. Legal expectations that sooner or later the English Courts would be faced with the problem of deciding whether such marriages or, as one might say, any of them, and if so which, were valid in the eyes of English law, have been partly fulfilled by the judgment of Lord Merriman, P., in *Apt v. Apt*.

This decision is of importance because it is the first of its kind in English law and sounds the theme of which variations are bound to be heard within the foreseeable future in many solicitors' offices.

The unprecedented facts before the Court were as follows: Husband and wife were German nationals of Jewish faith, the husband at all times material to the case being domiciled and resident in the Argentine and the wife domiciled and resident in England. During the war the husband, by correspondence, proposed marriage, which the wife accepted. On the advice of an Argentine lawyer in England, the wife executed a power of attorney, authorising one of her women friends in the Argentine to go through a form of marriage there with the husband on her behalf. The marriage was celebrated in the Argentine as arranged and was valid according to the law of that country. The wife's sole reason for marrying in this way was the war-time restrictions on travel. These restrictions continued to prevent her from joining her husband, and as eventually she heard no more from him she petitioned the English Court for a decree of nullity of marriage. The Court recognised the validity of this marriage according to English law, including the English rules of conflict of laws, and accordingly dismissed the petition.

It was held that the marriage was celebrated where the power of attorney could be exercised by the proxy, that is, in the Argentine. The Court did not accept the argument of counsel for the petitioner, in his attempt to read into the English statutes regulating the form of marriage an expression of public policy, that both parties should be present at the ceremony. Even if such a policy underlay the English statutes dealing with the form of ceremony, those statutes had no more application to a marriage celebrated in the Argentine than had Lord Hardwicke's Act of 1753 to Gretna Green marriages; for the Court classified the question of the proxy form of marriage as being one of pure form, and following Viscount Dunedin's judgment in *Berthiaume v. Dastous* (1930), 99 L. J. P. C. 66, determined the formal validity by Argentine law. A presupposition for the application of this principle was that the marriage was a Christian type of marriage in the sense used by Lord Penzance in *Hyde v. Hyde* (1866), 35 L. J. P. & M. 57. In only one incidental but important factor does a question of the essentials of marriage, governed by the law of the party's domicile, arise, that is, that an infant cannot give a power of attorney in this country: *Oliver v. Woodroffe* (1839), 8 L. J. Ex. 105. Though the Court refused to accept counsel for the petitioner's argument on public policy on the grounds that the Courts could create no new head of public policy (*Janson v. Driefontein Consolidated Mines, Ltd.* (1902), 71 L. J. K. B. 857) and that public policy itself demanded, "by virtue of the comity of nations, the recognition of marriages celebrated out of this country in accordance with forms and ceremonies in no wise conforming to those prescribed by the Marriage Acts" (*per* Lord Merriman, P., at p. 626), the instances which counsel gave of the dangers inherent in the recognition of proxy marriages, *e.g.*, an increase in the inward traffic in prostitution, were not without effect, for the learned President limited his decision to the type of proxy marriage with which he was dealing. "It may well be", he remarked, "that the problem should be sub-divided into categories and the test of public policy be applied, if at all, to each category separately. . . . I do not think it is necessary to pursue this topic further than to say that I am not satisfied that a single test of public policy can be applied to all proxy marriages indiscriminately" (at p. 629). The situation in his view called for "the definition by Parliament of the conditions in which proxy marriages shall or shall not be recognised" (at p. 630). An interesting feature of this judgment is the extent to which the Court relied on American decisions, particularly on *Ex p. Suzanna*

(1924), 295 Fed. Rep. 713, and *U.S. v. Tuttle* (1925), 12 Fed. Rep. (2nd Series) 927, in both of which American Courts had recognised the validity of marriage by proxy. One may therefore suggest that should a case arise involving marriage by correspondence, or by telephone, between parties in different countries at the time of marriage, the English Court may be inclined to follow the American precedent of holding the marriage valid as to form if it is valid by the law of the country from which the acceptance was sent: *Great Northern Ry. v. Johnson*, 254 Fed. 683 (1918).

POSTSCRIPT

On November 10, 1947, the Court of Appeal (Tucker, Bucknill and Cohen, L.J.J.) dismissed the appeal of the petitioning wife in *Apt v. Apt*. From a newspaper report of the proceedings (*The Times*, November 11, 1947), the Court of Appeal held "that neither marriage by proxy in general, nor that contracted between the parties to the appeal, is contrary to public policy". A contrary decision would have amounted, in the opinion of the Court, to holding that the law of the Argentine "was contrary to essential justice and morality". Though the judgments do not apparently refer to marriages other than by proxy mentioned in the foregoing note, the Court's wide statement as to proxy marriages *in general* will probably influence the decision of any Court having to deal in future with marriages by correspondence, telephone or—who knows?—radio.

Condonation of adultery—effect of revival on co-respondent's liability to costs—Barnes v. Barnes, [1947] 2 All E. R. 326.—Some uncertainty has existed on the question of whether a husband's condonation of his wife's adultery operates to free the co-respondent from liability to pay damages or costs if the wife by some subsequent matrimonial offence revives the condoned adultery. In this case, on a wife's petition for divorce, the husband presented a cross-petition on the ground of a revival by the wife's desertion of adultery which he had condoned. Hodson, J., emphasised the distinction between condonation in its legal sense and forgiveness in its popular sense and pointed out that condonation did not extend to the co-respondent any further than it did to the wife. "It seems to me impossible to come to any other conclusion but that he (the co-respondent) not having in any sense been forgiven and no charge having been waived or withdrawn against him (as I suppose might be the case if, for example, a deed were entered into between the husband and himself), once the condonation has gone against the wife, it must also go against him": *per* Hodson, J., at p. 327. The co-respondent was ordered accordingly to pay the whole costs of the suit. The reasoning of Hodson, J., appears wide enough to include liability to damages as well as to costs.

(Latey, p. 265)

The standard of proof in allegations of adultery—Ginesi v. Ginesi, [1947] 2 All E. R. 438.—A decision of the Divisional Court (Hodson and Barnard, J.J.) on a wife's appeal from the order of magistrates discharging a separation order in her favour on her husband's allegation of adultery has clarified the strict nature of proof required where adultery is alleged. Following the *dictum* of Lord Merriman, P., in *Churchman v. Churchman* (1945), 114 L. J. P. 17, that "the same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offences properly so called", the Court allowed the appeal. It may be that this decision is an indication of a stricter judicial attitude towards proof of

matrimonial offences generally and of adultery, historically a quasi-criminal offence, in particular.

(Latey, p. 349)

Divorce—whether conduct arising from illness constitutes cruelty—Squire v. Squire, [1947] 2 All E. R. 529.—The only importance of this decision for practitioners is the emphasis it places on the requirement of intention or malignity as an essential element in the matrimonial offence of cruelty. On a husband's petition for divorce on the ground of his wife's cruelty, he showed to the satisfaction of the Court that his wife's persistent conduct over a period of years while she suffered from severe illness in fact made it impossible for him to live with her. But the subjective tests in matrimonial cruelty are two: (a) whether the action on the part of the respondent husband or wife is intentional in relation to its results; and (b) what effect does or may such conduct have on the bodily or mental health of the other party? There being no evidence to satisfy the first test in this case, the petition was dismissed.

(Latey, p. 76)

5. DEATH DUTY CASES

By L. J. STEIN, Barrister-at-Law

Estate duty—succession duty—covenant by A with B to pay annuities to dependants of B on B's death—dependants not parties to instrument—Finance Act, 1894, s. 2 (1) (d); Succession Duty Act, 1853, s. 2; Law of Property Act, 1925, s. 56.—Re Miller's Agreement, Uniacke v. Att.-Gen., [1947] 2 All E. R. 79, was concerned with an arrangement between the members of a partnership, whereby A and B, the continuing partners, covenanted with C, a retiring partner, that as from C's death they would pay certain annuities to his children, the annuities being charged on their respective interests in the partnership assets. The children were not parties to the instrument. On C's death, estate duty was claimed by the Crown under section 2 (1) (d) of the Finance Act, 1894, which provides that property deemed to pass at the death of the deceased shall be deemed to include "any annuity . . . purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising on the death of the deceased". There was also a claim to succession duty by reference to section 2 of the Succession Duty Act, 1853, whereby "every disposition of property, by reason whereof any person has become beneficially entitled to any property . . . upon the death of any person . . . shall be deemed to have conferred . . . a succession". On both points Wynn-Parry, J., gave judgment against the Crown, the decisive consideration being that, so far as the annuitants were concerned, the deed of covenant was *res inter alios acta*. The Deed created no trust in their favour nor did it give them any right of action at common law: *Re Schebsman*, [1944] Ch. 83. By section 56 of the Law of Property Act, 1925, the circumstance that a person was not named as a party to a covenant or agreement relating to property will not prevent him from taking the benefit of such covenant or agreement, but there is ample authority for the proposition that that section presupposes the existence of a right and is concerned with its enforcement. It came back, therefore, to the question whether the annuitants had any rights under the covenant. The learned Judge being of opinion that they had not, it followed that section 56, above, was not in point. Accordingly, the claim to estate duty failed, on the ground that, although the annuities were clearly

within the words "any annuity . . . purchased or provided by the deceased", there was not, within the meaning of section 2 (1) (d), any "beneficial interest accruing or arising . . . on the death of the deceased", since "interest" must be taken to mean such an interest as would be protected by a Court of law or equity. As to the succession duty claim, the annuitants—it was held—did not, within the meaning of the statute, become "beneficially entitled" to anything on the death, since the word "entitled" meant legally entitled so as to be in a position to sue for and recover the property in question.

Estate duty—Irish settlement of Irish lands—proceeds of sale re-invested in England—whether situate out of United Kingdom—Finance Act, 1894, s. 2 (2).—The decision of Roxburgh, J., in *Re Middleton's Settlement, Cottesloe (Lord) and Cody v. Att.-Gen. and Middleton (Earl)*, discussed in *The Conveyancer*, June, 1947, at p. 304, has now been affirmed by the Court of Appeal: [1947] 1 Ch. 583.

6. INCOME TAX CASES

By L. J. STEIN, Barrister-at-Law

Surtax—covenant to pay annual sums equivalent to net dividends from company controlled by covenantor—power to revoke or determine—Finance Act, 1938, s. 38 (1).—X held 70 per cent. of the shares in an investment company, the remaining shares being held by his brothers and by the trustees of a settlement made by his father. He entered into an irrevocable covenant with the trustees to pay to them such an annual sum as would, after deduction of tax, leave a net amount equal to the net amount of his dividends from the company, the annual sums to be applied for the benefit of his sisters. The question which arose in *Wolfson v. C. I. R.*, [1947] 2 All E. R. 150, was whether on these facts X could be said to have power to revoke or determine the settlement so as to require the annual sums to be treated as his income by virtue of section 38 (1) of the Finance Act, 1938. The Crown's contention was that section 38 (1), above, applied, since, with the help of one brother, X could cause the company to be wound up, thus destroying the source of the annual payments and bringing them to an end. He could not do this single-handed, since he held only 70 per cent. of the shares, but the statute speaks of a power which can be exercised "with or without the consent of another person", and this, it was said, was a case in which there was a person having power to revoke or determine the settlement with the consent of another person. In deciding in favour of the taxpayer, Atkinson, J., pointed out that full weight must be given to the opening words of the sub-section: "If and so long as the terms of the settlement are such that . . .". The covenantor's control of the company was not derived from anything in the deed of covenant, nor was this a case in which it could be said, on the analogy of *C. I. R. v. Payne* (1940), 23 T. C. 610, that the deed of covenant plus the constitution of the company together represented an "arrangement" amounting to or settlement within the definition in section 41 (3) (b) of the 1938 Act. There was the further consideration that, in any case, the covenantor was not, in fact, in a position to cause the company to be wound up; he would require the co-operation of at least one other shareholder, and, said the learned Judge, "the ability of two shareholders acting together to bring about a certain result seems to me something different from the ability of one to bring about the result with the consent of another".

Income tax—annual payment under settlement—deficiency payments out of capital—Income Tax Act, 1918, All Schedules Rules, r. 21.—In *John Morant Settlement Trustees v. C. I. R.*, [1947] T. R. 309, the trustees of a settlement made by X for the ultimate benefit of his descendants held the income of the settled fund on protective trusts for the benefit of X during his life. It was provided in the settlement that if, in any year, the net income of the settled fund, after deduction of tax, fell short of £6,500, an amount equal to the deficiency was to be raised by the trustees out of capital and paid over to X. Deficiency payments out of capital having been made by the trustees, they were assessed in respect of those payments under rule 21 of the All Schedules Rules. It is well established by a line of cases starting from *Brodie's Trustees v. C. I. R.* (1933), 17 T. C. 432, that where, under a will or settlement, payments are made out of capital to bring an annual sum up to a specified amount, such payments fall to be treated as income in the hands of the beneficiary and, accordingly, are assessable to tax under rule 21. In the case under notice it was contended, on the strength of certain observations in the judgment in *Brodie's Trustees v. C. I. R.*, above, that the deficiency payments were not taxable, since the settled fund (it was said) belonged to the settlor and payments to him out of the capital of the fund retained the quality of capital. This rather surprising suggestion found no favour with Macnaghten, J., who pointed out that, the settlement once executed, the settled fund had ceased to belong to the settlor; his only beneficial interest in the capital of the fund was his right to have it drawn upon, in certain circumstances, for the purpose of supplementing his income. On a subsidiary point, however, the appellant taxpayer succeeded. The Revenue authorities were not content with demanding tax under rule 21 on the actual amount of the deficiency payment in each year. They contended that tax was payable on the gross equivalent of that amount, or, in other words, that in a year in which the deficiency payment was, in fact, £3,895, it must be deemed, for the purpose of the rule 21 assessment, to have been £3,895 grossed to tax at the standard rate in force for the year of payment. Dismissing this contention as being based on a fiction, the learned Judge held that the trustees were liable for the amount of the tax which they ought to have deducted on making the payment and for nothing more.

Income tax and surtax—transfer of assets abroad—whether individual has "power to enjoy" income—Finance Act, 1936, s. 18.—The decision of Macnaghten, J., in *Vestey v. C. I. R.* (see *The Conveyancer*, June, 1947, at p. 302) has been affirmed by the Court of Appeal: [1947] T. R. 355. The main interest of the case lies in the light that it throws upon the application of section 18 of the Finance Act, 1936, which is designed to prevent avoidance of tax by means of transfer of assets resulting in income becoming payable to persons abroad. Though the Court of Appeal came, in the end, to the same conclusions as Macnaghten, J., there was one important point on which it differed from the learned Judge. The income caught by section 18, above, is income of the person abroad which the taxpayer has "power to enjoy" within the extended meaning given to that expression in sub-section (3) of the section. The learned Judge appeared to take the view that, once it had been established that the taxpayer had had control over the income in question for a moment of time in year one, he would be taxable, under section 18, in respect of that income, for year two, even though in year one he had made a disposition of such a nature that in year two he had no "power to enjoy" the income within the statutory meaning of those words. It is clear from the judgments in the Court of Appeal, and particularly from that of Tucker, L.J., that the existence of "power to

enjoy" falls to be determined, in relation to each year of assessment, by reference to the position in that year. What mainly decided the case against the taxpayer in the Court of Appeal was the fact that, in settling the income on trusts for the benefit of his children and remoter issue, the taxpayer had inserted an investment clause providing, in effect, that the settled fund, consisting of accumulations of income, should, at the direction of the settlor, be invested in any of a wide range of investments including "loans to any company . . . with or without security". It was held that the right to give directions under the investment clause was an "asset" within the definition of that word in sub-section (5) of section 18, and that, since the receipt of the income in question operated to increase the value to the taxpayer of that asset, he had "power to enjoy" within the meaning of paragraph (b) of sub-section (3). It was held, further, that he had also "power to enjoy" under paragraph (c) of that sub-section. It appeared from the Case Stated that there had been a series of financial operations amounting, in effect, to the receipt by the settlor of loans free of interest from a company to which large sums of money had been lent at interest by the settlement trustees. It followed that the settlor had "power to enjoy" within the meaning of paragraph (c), above, in that he had received a benefit provided out of moneys available for the purpose by reason of the effect of "associated operations" on the income in question. In arriving at the conclusion that the taxpayer was caught by paragraph (c), the Court attached importance to the fact that he had power under the settlement to remove and appoint trustees. In order that section 18 may apply, the taxpayer must not only have "power to enjoy" but must have that power by virtue of rights acquired by means of the transfer or of the transfer plus associated operations. The taxpayer's control over the trustees was one of the rights acquired by him by means of the transfer plus associated operations and helped to weight the scales in favour of the view that he had "power to enjoy" by virtue of such rights.

Surtax—interconnected companies—all incorporated outside United Kingdom—Finance Act, 1938, ss. 38, 41 (4) (a) (ii); Finance Act, 1939, s. 13.—In *Scott-Ellis v. C. I. R., Atkinson, J.*, in giving judgment in favour of the taxpayer, expressed the hope that the case might go further, whereupon counsel for the Crown is reported to have observed: "It is very much in the nature of a lottery, my Lord". In an obscure contest, turning, as so often happens in tax cases, on the loose or confused use of words, the second round has now been won by the Crown, the decision in the King's Bench Division having been reversed by the Court of Appeal: [1947] T. R. 345. The point at issue has already been fully explained in the note on the case in *The Conveyancer*, September, 1947, at p. 70. The question to be decided was, briefly, as follows: Company A is the trustee of a settlement. It holds virtually all the shares in Company B, which is incorporated outside the United Kingdom. Company B holds shares in Company C, which is likewise incorporated outside the United Kingdom. By virtue of section 41 (4) (a) (ii) of the Finance Act, 1938, the "income arising under the settlement" clearly includes the income of Company B. Is the effect of section 13 (3) of the Finance Act, 1939, so to enlarge the scope of section 41 (4) (a) (ii) of the 1938 Act as to cause the "income arising under the settlement" to include, not only the income of Company B, but also so much of the income of Company C as could have been apportioned to Company B and via Company B—under the chain of companies provisions of the Finance Act, 1927—to Company A, had both B and C been incorporated in the United Kingdom. To this question the Court of Appeal, differing from the learned Judge in the Court below, has unanimously replied

in the affirmative. Asquith, L.J., made some uncomplimentary allusions to "the congeries of baffling and ill-drafted provisions" which the Court was called upon to construe, and it is not surprising that leave was given to appeal to the House of Lords.

7. LANDLORD AND TENANT CASES

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law, and J. T. PLUME, Barrister-at-Law

Intimation that sub-tenants might carry on until certain date—notice to quit before that date—doctrine of Central London Property Trust v. Hightrees House considered and distinguished.—In the case of *Foot Clinics (1943) v. Cooper's Gowns*, [1947] 1 K. B. 506, an unsuccessful attempt was made to invoke the principle of *Central London Property Trust v. Hightrees House*, [1947] 1 K.B.130. In the *Foot Clinics' Case* a lease made in 1941 was for a term expiring "when all physical hostilities on the part of the armed forces of the belligerent parties in connection with the war shall have ceased for a continuous period of six months, subject to the term not exceeding December 15, 1947". By virtue of the Validation of War-Time Leases Act, 1944, this lease was determinable by one month's notice in writing given after November 9, 1945. On January 6, 1946, the landlords wrote to the tenants saying: "We would therefore suggest that so far as we can see at present there is no reason why you should not carry on until the expiration of your lease on December 15, 1947, when our own lease expires". On August 16, 1946, the landlords wrote giving the tenants one month's notice to quit; subsequently they brought proceedings to recover possession. The tenants contended that they had been misled by the landlords' letter of January 1, 1946, and that it would be inequitable in those circumstances to give the landlords possession.

It was held that the landlords' letter of January 1, 1946, was not a promise to allow the tenants to remain in occupation of the premises until December 15, 1947, which was intended to create legal relations, and that, therefore, the letter was no bar to the landlords exercising their rights to possession. Denning, J., pointed out that the essential point in the *Central London Property Trust Case* was that there was a promise which was intended to create a legal relationship, intended to be legally binding. In the present case, however, the letter contained no express promise and no promise could be inferred; it was therefore no bar to the landlords exercising their rights to possession.

The case of *Central London Property Trust v. Hightrees House* was discussed at some length in *The Conveyancer*, Vol. 11, p. 128. If the tenants' contention had prevailed in the present case it would have amounted practically to a decision that almost any expression of intention on the part of a landlord, without any consideration whatsoever, not to give notice to quit before a certain date would give the tenant security of tenure up to that date, regardless of the nature of his tenancy: this would be an extraordinary doctrine and it is not surprising that Denning, J., declined to stretch his earlier decision that far. It is thought that the tendency of the Courts will be against developing the principle of the *Central London Property Trust Case*.

(Woodfall, 24th ed., p. 949)

Option to take a building lease—conditional upon performance and observance of agreements—sufficient if breaches ended when option exercised.

—Where a short-term tenancy agreement gave the tenant an option for a building lease “subject to the tenant having faithfully performed and observed” all her agreements therein contained, it was held by Evershed, J., that it was sufficient that the tenant, when she came to give her notice exercising the option, had then ended any previous breaches of covenants or failure to perform the covenants: *Robinson v. Thames Mead Park Estate*, [1947] Ch. 334.

Another point which arose was that the tenant undertook also as a condition of the option “to erect before a date to be agreed upon” a private dwelling-house of a certain defined standard. Evershed, J., held that the omission to provide for the contingency of failure to agree upon the date did not invalidate the option for uncertainty; it meant that in default of agreement upon this the Court would have to fix what was reasonable. The option was therefore specifically enforceable.

(Woodfall, 24th ed., pp. 166, 1004)

Notice to quit—valid if expiring on anniversary of date of commencement of tenancy or on day before—validity of alternative clause.—In *Crate v. Miller*, [1947] 2 All E. R. 45, the Court of Appeal considered the effect of a notice to quit to determine on a Friday a weekly tenancy which commenced on a Saturday. The Court held, following the decisions in *Sidebotham v. Holland*, [1895] 1 Q. B. 378, and *Queen's Club Gardens Estate, Ltd. v. Bignell*, [1924] 1 K. B. 117, that the notice was valid. Adopting the principles laid down in the latter case, the Court held that the same principle is to be applied in all cases of periodical tenancies, whether yearly, quarterly, monthly or weekly, and that a notice to be valid must be so expressed as to determine the tenancy at the end of a current period. The Court further held that a notice to quit on either the anniversary of the date of commencement or on the day before is valid. In the case before the Court the notice contained an alternative in these words, “or at the end of the next complete week of your tenancy from the date hereof”. Without deciding the point the Court queried the validity of such alternative. It is clear that this particular form of alternative might be open to objection in view of the use of the words “from the date hereof” in place of the more usual words “from the date of service hereof”. Such a form would certainly not be valid if the next complete week from the date of the notice had already commenced at the time of the service of the notice. However, the point was never argued as the tenant appeared in person and the landlord did not appear. It is submitted that the doubt expressed by the Court can only refer to the particular form of alternative used in this case and not to the general form of alternative which is so commonly used these days and which has been accepted as valid for well over a hundred years. *Vide* the specimen forms in Woodfall, 24th ed., pp. 1327 and 1328.

(Woodfall, 24th ed., pp. 972, 973)

Agricultural Holdings Act, 1923—compensation—whether tenant quitted “in consequence of” notice to quit—tenant quitting after Court order—test to be applied.—In *Preston v. Norfolk County Council*, 63 T. L. R. 441, the Court of Appeal was required to construe the provisions of section 12 (i) of the Agricultural Holdings Act, 1923. Under the provisions of that section where a tenancy is determined by notice to quit given by the landlord, and “in consequence of such notice the tenant quits the holding”, then the tenant is entitled to compensation, etc. In the case before the

Court notice to quit had been served by the landlord and the tenant held over after its expiry. The landlord took proceedings in ejectment which the defendant contested on the ground (*inter alia*) that the notice to quit was invalid. The Court granted the landlord an order for possession. The tenant then claimed compensation for disturbance under section 12 (i). It was argued on behalf of the landlord that the tenant had never quitted "in consequence of" the notice to quit, but rather in consequence of the order of the Court in the proceedings taken to evict him and under the compulsion of that order. The question for the decision of the Court really resolved itself into whether there was a sufficient causal link between the notice to quit and the actual quitting of the holding by the tenant. The Court held that a lapse of time between the expiry of the notice and the quitting by the tenant did not *ipso facto* destroy such link. The question was one of fact, the Court decided, on which the decision of the arbitrator was final provided there was evidence to support such decision. In the present case the Court did not think that it was open to the arbitrator to find other than he did (*i.e.*, that the tenant quitted in consequence of the notice) in view of the fact that in the ejectment proceedings the tenant was testing the validity of the notice to quit. However, the Court further expressed the opinion that the true answer to the problem could not depend on whether an ejectment order was, or was not, in fact asked for or made. There might be cases where the tenant would quit in consequence of a notice although some interval might elapse between its expiry and the tenant's quitting, for example, the tenant might be ill and unable to vacate on the date of expiry of the notice. He would still quit in consequence of such notice if he vacated as soon as he was well enough to do so even although he did not seek to challenge the validity of the notice.

A further point taken by the landlord was that the tenant who held over became a trespasser and consequently could not bring himself within the words of section 12 (i) in that when he quitted he could not be described as a "tenant" who quitted in consequence of, etc. Here again the Court held against the landlord and said "a tenant who quits in consequence of a notice, even if he does so after some interval of time, must be regarded as a tenant for the purposes of section 12 (i)".

The Court declined to follow the case of *Hendry v. Walker*, [1927] S. L. T. 333, and also expressed the opinion that the case of *Cave v. Page*, [1923] W. N. 178, in so far as it laid down that there must be a co-incidence of time between the quitting and the expiry of the notice, must be regarded as a decision under the particular wording of the Agricultural Holdings Act, 1908, and as such not applicable to cases under the Act of 1923.

(Woodfall, 24th ed., pp. 1036, 1047)

Rent Restrictions Acts—lawfulness of sub-letting by statutory tenant—doctrine of waiver by acceptance of rent in relation to statutory tenancy.—In *Oak Property Co. v. Chapman* (1947), 63 T. L. R. 338, the Court of Appeal had to consider some important questions in relation to sub-lettings by statutory tenants.

The facts of that case were that the landlords let a controlled house to C. for two years from June 20, 1942, by a lease which contained a covenant by C. not to sub-let without consent. C. held over as statutory tenant after the expiration of his term. At some date before March 1, 1946, C. without consent of the landlords sub-let part of the premises furnished to J. On March 1, 1946, C. without consent of the landlords sub-let the remainder of the premises unfurnished to K. On August 1, 1946, J. left that part of the premises which had been sub-let to her, and

from then on that part remained unoccupied save that C.'s furniture was left there. On August 20, 1946, the landlords brought an action to recover possession of the whole house. C. consented to judgment but K. claimed that she was a sub-tenant to whom part of the premises had been lawfully sub-let within the meaning of section 15 (3) of the 1920 Act.

Had the action been started three weeks earlier it would have raised the question whether a sub-tenant to whom part is let, the remainder having already been sub-let, can claim to have a "lawful" sub-tenancy within the meaning of the Acts. It has more than once been laid down that a statutory tenant cannot sub-let the whole of his premises, and that is the proposition stated in the books. Supposing, however, that he purports to do so: has the "sub-tenant" got any interest which will enable him to hold over under section 15 (3) of the 1920 Act? Probably not, but the informative judgments given by the Court of Appeal in *Haskins v. Lewis*, [1931] 2 K. B. 1, and other cases cannot be said to have resolved the matter conclusively because this particular issue did not arise there. In *Roe v. Russell*, [1928] 2 K. B. 117, Scrutton, L.J., expressly reserved this very question (see p. 130).

In the case at present under consideration, however, the Court of Appeal had to deal with the position as at the date of commencement of the action for possession, and that was August 20, 1946, at which date the other sub-tenant J. had gone and that part of the premises, though not occupied residentially, had C.'s furniture in it. The Court of Appeal held that in these circumstances C. retained at the material date a sufficient possession of the part of the premises which was not then sub-let to preserve her rights as statutory tenant.

The landlords had, however, accepted two instalments of rent from K. after they had knowledge of the breach of covenant by C. in sub-letting without consent. This raised the question of waiver of the right to treat the sub-letting as unlawful: see *Norman v. Simpson*, [1946] K. B. 158, which was considered in *The Conveyancer*, Vol. 10, at p. 176. In deciding that there was in the present case condonation of the breach the Court of Appeal has laid down the following principle as governing waiver by acceptance of rent in the case of statutory tenancies (63 T. L. R. at p. 341): "Thus we are strongly inclined to think that the strict common law rule with regard to a qualified acceptance of rent is not applicable to a statutory tenancy, and that a qualified acceptance of rent from a statutory tenant is not necessarily fatal to the landlord's rights to seek an order for possession. As at present advised we think that the fair rule is that a landlord who has acquired full knowledge of a non-continuing breach of covenant by a statutory tenant entitling him to invoke the Court's jurisdiction should be entitled thereafter to receive rent and should not by reason of such receipt be held to have waived the breach, provided that he makes it clear to the tenant at the time of or before the receipt that his receipt is without prejudice to his right to go to the Court, and provided that he issues his summons for possession within such time as, having regard to all the circumstances of the case, the Court hearing the summons regards as reasonable". This is a very important departure from the strict common law rule, as to which see *Matthews v. Smallwood*, [1910] 1 Ch. 777, *per Parker, J.*, at pp. 786-7.

(Woodfall, 24th ed., p. 926; Rent Restrictions Guide, 2nd ed., p. 69)

Rent Restrictions Acts — greater hardship — whether Judge's findings of fact can be questioned on appeal.—The question whether the Court of Appeal is entitled to consider the County Court Judge's findings of comparative hardship in cases where possession is claimed under paragraph (h)

of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was considered by the Court of Appeal in *Coplands v. King*, [1947] 2 All E. R. 393. Reliance was placed on *dicta* in *Chandler v. Strevett*, [1947] 1 All E. R. 164, and the appellant invited the Court to reconsider the Judge's findings on the question of comparative hardship. The *dicta* relied upon were those of Scott, L.J., which were to the effect that the Judge's findings of fact on the evidence were final but that his inferences regarding the incidence of hardship were open to review. The Court dissented from these *dicta* and held that the decision of the Judge with regard to the balance of hardship was final and could not be made the subject of appeal. Lord Greene, M.R., stated the law in these words: "Of course, if in a case there is evidence of hardship on one side and none on the other, the County Court Judge can come to only one conclusion, and if he finds hardship where the facts are not sufficient to constitute hardship in law, for example something trivial, like the absence of a view of a neighbouring hill, river, tree, or something pleasant of that kind, he makes an error in law, but, once there is evidence which in law can amount to hardship on two sides, Parliament has deliberately made the County Court Judge the conclusive judge of the fact which is the greater hardship".

(Rent Restrictions Guide, 2nd ed., p. 61)

Rent restrictions—greater hardship—matters which Judge can properly consider.—Two other decisions of the Court of Appeal on questions which arose under paragraph (h) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, should be noted on account of their practical importance. The first is the case of *Harte v. Frampton*, [1947] 2 All E. R. 604. In that case the Court decided that the County Court Judge was right in taking into account hardship to the tenant's daughter, son-in-law and grandchild who resided with him, but who were not financially dependent on him. It was argued that the "hardship" contemplated by paragraph (h) was hardship to the landlord or the tenant and that hardship suffered by other persons living with the landlord or tenant could only be regarded as constituent elements in the hardship suffered by the landlord or tenant if such persons were their dependants. The Court declined to accept this argument and refused to follow the Irish case of *Cooley v. Walsh*, [1926] Ir. R. 239. In the course of the judgment of the Court the guiding principles are expressed thus: "The true view, we think, is that the County Court Judge should take into account hardship to all who may be affected by the grant or refusal of an order for possession—relatives, dependants, lodgers, guests, and the stranger within the gates—but should weigh such hardship with due regard to the status of the persons affected and their 'proximity' to the tenant or landlord, and the extent to which, consequently, hardship to them would be hardship to him. The inability to take in a guest for the week-end would no doubt be assessed by the Judge at nil. The extrusion of a loved and trusted relation, whether dependent or not, would weigh heavily in the scales".

The other case is that of *Rhodes v. Cornford*, [1947] 2 All E. R. 601. In that case the landlord had her daughter, upon whom she was dependent, living with her. The daughter had to make a long and complicated journey to her work each day which could be avoided if possession was granted of the tenant's house. The Court held that the County Court Judge ought to have taken into consideration the hardship suffered by the daughter. The Court also held that, on the question of reasonableness, that it was the duty of the Judge to take into account all the relevant circumstances at the date of the hearing, and rejected the contention that the test of reasonableness

must be applied without consideration of any facts material to claims (whether formulated or not) under any other paragraphs of the First Schedule or under section 3 (1) (b).

(Rent Restrictions Guide, 2nd ed., p. 61)

THE LIBRARY

Commentaries on the Law of Real Property. By WILLIAM F. WALSH, Professor of Law, Emeritus, New York University. 3 Vols. Matthew Bender & Co. Inc., Albany, N. Y. 1947. 744 and 795 and 510 pp. (In England) £8 5s.)

We would begin this review by remarking that in our opinion this work should be found in every English Law Library. The opening paragraph of the introduction by Mr. Russell D. Niles gives the clue to the character of the work: "Professor Walsh had completed the manuscript of *Commentaries on the Law of Property*, and was correcting proof when he was stricken suddenly with a fatal illness on September 18, 1946. He had been at work in the preparation of the manuscript for ten years. In a larger sense he had been at work on this treatise for forty-five years. These volumes represent the ultimate contribution of a scholar who had spent a life time reading and thinking and teaching the law of property".

A further extract from the same introduction will explain the scope of the work: "The scheme of the work is, first, to deal with general fundamental matters, such as the nature of property rights, the relation of possession to ownership and the incidents of ownership of land. Then the various possessory estates and the major relationships are discussed separately: the inheritable estates, the life estates, including the marital life estates, concurrent estates, and estates less than freehold (landlord and tenant). Then follow conveyancing, easements and covenants. The final volume covers conditional estates, the various future interests at Common Law and under modern statutes, and the various common law and statutory rules against the perpetuities".

There is in fact no analogous work in modern English Property Law. For example, Professor Cheshire's work deals in something over a hundred pages with the contents of the final volume of 500 pages. Obviously single topics, such as landlord and tenant, are dealt with at greater length in English text books, but we have no similar masterly attempt to deal with the property law side as a whole and in such detail. For this reason, in particular, we find it in our heart to regret (though we can scarcely blame him) that the learned author has used so little modern English authority. He cites *Williams' Real Property*, by the 17th ed. (1892), and constantly refers to Digby, *History of Real Property*, which we should have thought was virtually superseded by Holdsworth.

It is rare to find an English case after 1880. This is not because the learned author is ignorant of these matters because from time to time he cites much more recent cases and, for example, he is quite prepared to criticise the view of Pollock and Maitland and Holdsworth concerning the original liability of a tenant for life for waste (Vol. 1, p. 323), and the modern line of English cases, denying that a tenant for life is liable for permissive waste which he argues is against the authority of Year Book Cases and Coke and Blackstone (Vol. 1, pp. 346, 347). Nevertheless he does not condescend much to later English law and, of course, ignores the Property Legislation of 1925. This last is no bad thing. In our view there are a large number of problems submerged in the 1925 Legislation that have not been adequately examined and for this a more detailed knowledge of the old law as a whole is really required than it is the current practice for modern young lawyers to acquire. This work would in that respect, be a good corrective. It is, in fact, replete with history and one cannot help feeling that "*Treatise on the Historic Property Law of the Common Law Systems*" might have been a more adequate title.

In the first place it is clearly a juristic attempt to state the law of property (not confined only to Real Property and Chattels Real). No student of jurisprudence should ignore the first 100 pages of Volume 1 on *Possession and Ownership*, however,

familiar much of it may seem. Throughout the work this juristic approach makes itself felt, even in little aphorisms as the one concerning the strict requirement of the words "heirs" in grants of fee simple (Vol. 1, p. 532): "Having become established, it was just the type of formalistic rule that appeals to the narrow and pedantic lawyer and judge. . . ." We do not need to agree with all that he says in order to appreciate the intrinsic value of this kind of work of which in all branches there is too little. Indeed we think that one of his basic conclusions does bewilder us here. At p. 15, n. 6 he says: "His (Hohfeld's) conclusions, now generally accepted as to the relations of law and equity, that substantial conflict exists in many situations between rules at law and in equity, and that in such cases the equity rule is the actual law and the opposing rule at law is spurious law, that trust estates are true rights in rem in the beneficiary, and that decrees in equity have the same force and effect as judgments at law. . . ." While the reviewer is in substantial agreement with much of this (more than some of his professional colleagues) it seems to go a good way towards that confusion between law and equity which marked the early days after the Judicature Act, 1873 and has led to some consequences not foreseen and, perhaps, not fortunate. Furthermore, it has left one apparent mark upon the whole work. It is very difficult to check whether a rule is applicable to both legal and equitable estates and in what way. For instance (Vol. 1, p. 543) in dealing with exceptions to the "discredited rule" requiring the use of the word "heirs" in a grant he says: "Equity has *always* rejected this rule in giving effect to conveyances or devises to trustees. The entire estate in fee passes to the trustee if such was the intent established by the terms of the trust though the word heirs was entirely absent". The italics are ours, but we suggest first, that equity could not affect a conveyance of the legal estate before 1875 and indeed it does not do so now; and secondly, *Re Bostock's Sett.*, [1921] 2 Ch. 469, makes it clear that it did not ignore words of limitation even when the whole estate was equitable. But this weakness of the work persists throughout because, no doubt, the law of equitable interests was regarded as falling primarily within another province. So, for example, in dealing with the destructibility of contingent remainders by failure of the remainder to vest (Vol. 3, pp. 143-149) the learned author only remarks in part of a footnote (at p. 145): "Equity has always repudiated the doctrine where equitable remainders are involved. . . . The logical fallacy and the stupid disregard of good policy and justice involved in holding that contingent remainders continued to be destructible after the enactment of the Statute of Uses. . . ." This links up with the statement (pp. 146-7): "It is very doubtful if this discredited doctrine, eliminated by statute in England where it originated out of the technicalities of feudal law. . . ." Internal evidence points to no reference to the Law of Property Act, 1925 here (which only incidentally destroyed the doctrine) but to the Contingent Remainders Act, 1877, which preserved it and, it is submitted, wisely preserved it, having regard to the Rule against Perpetuities, as is illustrated by the contrast between such cases as *Symes v. Symes*, [1896] 1 Ch. 272 and *In re Robson*, [1916] 1 Ch. 116.

Another example of this juristic approach is the learned author's criticism of the English line of authority (not apparently followed in the United States) which holds that there can be no implied reservation (as distinct from implied grant) of an easement unless "necessity" can be established. This is regarded as an error derived from the rule of *construction* that a grant shall be construed most strongly against the grantor. Vol. 2 at p. 591 he says: "The English courts have been led to a wrong position by mistaking a mere rule of construction for an all-controlling maxim, and by losing sight of the underlying principle". We regret that in his brief chapter on licences (chapter 32) the learned author did not analyse the later English cases for he seems convinced that a mere licence can always be revoked and a licence coupled with an interest appears to be one attached to property and not merely exercisable over property.

The second marked feature of this work is its historical approach, as indeed might be expected from the author of the *History of Anglo-American Law*. The learned author is not content with "digging up the roots to see how they have grown" in the treatment of special topics, but opens up each branch of the law with at least an outline of its history, so in Part V dealing with Conveyances his first chapter is an "Outline of the History of Conveyances" and begins with the Saxon and Feudal period. We mention this particular chapter because we should have thought that it was the least necessary to a work primarily devoted to modern

law. We are reminded of what Challis wrote some years ago (see *Challis' Real Property*, 3rd ed., p. 431): "Nor do I think it permissible, unless under the most extraordinary circumstances, to cite in Court any authority older than Littleton. The most profound real property lawyer now living holds this opinion so strongly, that he once even apologised to the Court of Appeal for citing Fitzherbert's *Natura Brevium* . . .". It is not, perhaps, for this reviewer to criticise the historical approach, but we think that antiquities belong either to another book or else to be treated as one whole giving the picture of the law in growth rather than as introductory to each section of the subject for otherwise it may lead to such archaism as is the basis of Challis' criticism. We feel this the more strongly because we know how difficult it is to condense sufficient history into manageable proportions and yet keep in it something of real value to the lawyer. Nevertheless, the historical bias adds greatly to the value of the work from the point of view of the English lawyer. It enables him to get the rules into a proper perspective and, indeed, to note inconsistency in development.

Space forbids further attention here to this stimulating and valuable work. It cannot be a work of general reference in this country, but it can be a most useful source in dealing with any of the more difficult problems that remain within the field of the Common Law or where, notwithstanding statutory intervention, the Common Law remains of fundamental importance.

HAROLD POTTER.

The Federal Administrative Procedure Act and the Administrative Agencies.

Edited by GEORGE WARREN. New York University School of Law.
1947. viii and 630 pp. (\$7.50.)

At first sight, this is a fearsome work. The Act itself takes up twelve pages; the rest is occupied by an uncorrected transcript of the shorthand note of a series of lectures on the Act, with an abridged transcript of the discussions. Six lectures deal with general problems; each of the remaining fourteen with the effect of the Act on a particular Agency. The style of most of the lectures is tiring to an English reader, and much of the detailed discussion of individual Agencies is incomprehensible to those unfamiliar with the particular statutes discussed. Nevertheless, the book is invaluable to a foreign student of American administrative law: unlike an ordinary textbook, it contains sufficient background information to enable a foreigner to catch a glimpse of the American administrative machine at work.

Administrative procedure is a complex subject, and it would be surprising if an attempt to codify it in five thousand words succeeded in carrying matters very far. What has been done is to lay down a procedure for making rules and a procedure for formal quasi-judicial hearings, and to list the grounds on which the Courts can review administrative action of all sorts, and to list the matters that an Agency must publish. It is naturally impossible for a single procedure or a single list to cover all activities of all Agencies, so what has been done is to lay down in detail the most formal procedure likely to be generally applicable, to add a sweeping list of exceptions, and to leave the matters excepted from the formal procedure substantially untouched by the Act. Those responsible for the passing of the Act are left declaring what an important measure it is, while the lecturing from the legal departments of the various Agencies appear to suggest (without as a rule actually saying so) that the Act increases red tape and will increase litigation, but makes little substantial change. Thus, the effect of the section on judicial review of Agency action is summed up as follows (p. 252):

"All I can say is it contains a lot of words and a lot of potential lawyers' arguments. But I do not think the words are really significant, because I think that within the framework of the existing standards of judicial review, if the Courts do not like what the Agency is doing, they will find some way to set it aside and if they do, I do not think any of those additional standards mean any more than perhaps that briefs are going to be longer in the future".

That statement might serve as a comment on English proposals to alter the standard of judicial review, too.

Where rule-making is concerned, the effect of the Act is to leave statutory rules open to attack in the Courts on procedural as well as substantive grounds, to an extent that would be intolerable by English standards; but that fits in with the

difference between our political systems. In England we are comparatively unaccustomed to judicial control of legislation, but are used to direct Parliamentary control of Government Departments. The American system emphasises independence—the Executive is independent of the Legislature, the Agency of the Executive; even Officials holding public inquiries for the Agency are now made independent of the Agency—so that judicial control of what to us are purely administrative functions seems the only sort of control possible. Even if the Act were a success, it would be a mistake to suppose it would necessarily work over here. In fact, this book left me convinced that it is not a success. It seems that an attempt was made to say far too much in far too few words, and that the main result is likely to be a temporary increase in litigation until the Courts have interpreted its provisions. Its effect cannot be truly permanent: for every time a new statute is passed dealing with administrative matters, a detailed procedure will have to be laid down, and this will exclude the Act or not according to the mood of Congress at the time. Nor is it a successful piece of drafting: there seems to be a complete divergence of opinion as to the meaning of most of the major provisions. The definition section especially is so sweepingly drawn that only the Courts can say even roughly what some of the key words mean. As one of the lecturers put it (David Reich, at p. 516):

“It is quite difficult to make a definition that will include everything and exclude all others.”

T. A. BLANCO-WHITE.

Town and Country Planning Law. By JAMES KEKWICK. London: Stevens & Sons, Ltd. xvii and 556 pp. (45s.)

A more appropriate title for this attractively produced book would have been “*The Town and Country Planning Act, 1947*”, for the volume is an annotated edition of this statute, together with a few associated Acts printed in full without comment. Your reviewer finds himself in complete agreement with the author's sentiments in the Preface as to the vital importance of this statute, and the brief Introduction is a useful summary of its provisions. The main body of the book (some 400 pages of clear type) consists of the *ipsissima verba* of Parliament, with the editor's comments thereon. These notes, though reasonably full, are explanatory rather than critical, and whereas some useful assistance is given the practitioner by way of interpretation of the words of the statute, but little reference is made to the previous law on the subject. Notes of the decisions of Ministers on the relevant sections of the 1932 Act would have been of value for some years to come, and more references to decided cases could have been included.

The arrangement of the book, which follows rigidly that of the Act, is inconvenient. A better arrangement, from the point of view of the two classes of readers for whom the book is presumably designed (legal advisers to local authorities, and private practitioners), would have been to follow the lines adopted in Mr. Heap's memorandum on the Act recently circulated to its members by the Law Society. If some such method had been adopted, prominence could have been given to such vital matters as the meaning of “development” (very different from its meaning for the purposes of the 1932 Act), and the charges on land capable of being created under the Act; matters of less general interest, such as the constitution of the Central Land Board, could have been relegated to an inferior position.

Now that the law of town and country planning has freed itself from its historical associations with the law of housing, and is no longer an esoteric branch of local government law, it is fully time that the subject should be considered from a wider approach, showing how this new legislation must be fitted into the general scheme of English land law. The subject of this note was probably not intended to satisfy this need, but it seems that a mere annotated reprint of the Act (however comprehensively and carefully the notes are prepared) is little more capable of digestion than is the Act itself when wet from the King's printer.

These views may however, result in part from a prejudice in principle against the “annotated Act” type of book, and it is only fair to observe that the present volume, by the very nature of the ground covered, will be of considerable value to conveyancers, who must in their own interests learn the detailed machinery of this statute as soon as possible. It is the first complete book on the Act to appear since Royal Assent, it has comprehensive indices and seems to be accurate in detail.

J. F. G.